

**Academic Standing**

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4010	LW	Civil Procedure	A	4.000	16.00	
JURI	4030	LW	Contracts	B	4.000	12.00	
JURI	4071	LW	Legal Writing I	B+	3.000	9.90	
JURI	4072	LW	Legal Research I	A	1.000	4.00	
JURI	4120	LW	Torts	B+	4.000	13.20	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	16.000	16.000	16.000	16.000	55.10	3.44
Cumulative	16.000	16.000	16.000	16.000	55.10	3.44

Term : Spring 2022

**Academic Standing**

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4050	LW	Criminal Law	A	3.000	12.00	
JURI	4081	LW	Legal Writing II	A-	2.000	7.40	
JURI	4090	LW	Property	A	4.000	16.00	
JURI	4180	LW	Constitutional Law I	A+	3.000	12.90	
JURI	4950	LW	Secured Transactions	B+	3.000	9.90	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	15.000	15.000	15.000	15.000	58.20	3.88
Cumulative	31.000	31.000	31.000	31.000	113.30	3.65

Term : Fall 2022

**Academic Standing**

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4190	LW	Constitutional Law II	B+	3.000	9.90	
JURI	4199	LW	Modern American Legal Theory	A-	3.000	11.10	
JURI	4210	LW	Corporations	A-	3.000	11.10	

Unofficial Transcript

6/9/23, 10:26 AM

JURI	4675	LW	Intl Business Transactions	A-	3.000	11.10
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Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	12.000	12.000	12.000	12.000	43.20	3.60
Cumulative	43.000	43.000	43.000	43.000	156.50	3.63

Term : Spring 2023

## Academic Standing

Good Standing

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
JURI	4088	LW	Writing for Judicial Clerkship	B+	2.000	6.60	
JURI	4420	LW	Const Liti Sem	A	3.000	12.00	
JURI	4460	LW	Crim Procedure I	B	3.000	9.00	
JURI	4581	LW	Select Topics in Judicature	S	1.000	0.00	
JURI	4720	LW	Intl Arbitration	A-	2.000	7.40	
JURI	5013	LW	Intl and Comp Law Journal	S	2.000	0.00	
JURI	5080E	LW	Life Cycle of the Corporation	B+	3.000	9.90	
JURI	5595	LW	Legal Topics Seminar	S	1.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	17.000	17.000	17.000	13.000	44.90	3.45
Cumulative	60.000	60.000	60.000	56.000	201.40	3.59

## Transcript Totals

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	60.000	60.000	60.000	56.000	201.40	3.59
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.00
Overall	60.000	60.000	60.000	56.00	201.40	3.59

## Course(s) in Progress

Term : Fall 2023

Unofficial Transcript

6/9/23, 10:26 AM

Subject	Course	Level	Title	Credit Hours
JURI	4250	LW	Evidence	3.000
JURI	4280	LW	Trusts and Estates I	3.000
JURI	4770	LW	Labor Arbitration	2.000
JURI	4990	LW	Employment Discrimination	2.000



UNIVERSITY OF  
**GEORGIA**

**Randy Beck**

*Justice Thomas O. Marshall Professor of Constitutional Law*

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June 9, 2023

The Honorable Leslie Abrams Gardner  
United States District Court for the Middle District of Georgia  
C. B. King United States Courthouse  
201 West Broad Avenue, 3<sup>rd</sup> Floor  
Albany, GA 31701-2566

**Re: Clerkship Application of Sean Klasson**

Dear Judge Gardner:

I write to offer my strong support for the clerkship application of Sean Klasson, a rising third-year student at the University of Georgia School of Law. Sean was a student in my Constitutional Law II class last fall and again this spring in a State Constitutional Law class I offer. Sean has impressed me with his intellect, ethics, maturity and writing skills. I recommend him highly.

Sean grew up in Rome, Georgia, the son of an orthopedic surgeon. He excelled academically in high school and earned admission to Duke University. One highlight of Sean's undergraduate education was the opportunity to spend a year studying abroad at the London School of Economics. He also interned for a private equity hedge fund during his college years. Sean was admitted to a national History honorary society and graduated from Duke with a double major in History and Economics.

After graduation, Sean put his economics training to work in online commerce. He became a business analyst for Walmart eCommerce. Sean and his peers were each put in charge of specific categories of products and instructed to act as if they were business owners. Tasks included selecting products, managing vendor relationships, managing inventory, evaluating prices and improving marketing. Sean's manager encouraged him to take on additional responsibilities for an entire team of analysts overseeing related product lines. For instance, Sean led a weekly strategy meeting during the peak sales season. In recommending Sean for law school, the manager noted that Sean was "unique among his peers" because he was "both incredibly cerebral and emotionally intelligent, a rare balance." "His insights, perspectives, and strategic blueprints became a benchmark for other leaders," according to the manager, who saw Sean as "the ultimate chess player for business strategy."

Sean earned a 172 on the LSAT, a score in the 98<sup>th</sup> percentile of test takers. We admitted Sean to the law school with a significant merit scholarship and he enrolled in the Fall of 2021. Students who spend time working after they graduate sometimes appreciate law school more than those who enroll straight out of an undergraduate program. The experience of earning a paycheck can produce maturity and help a student recognize the value of the opportunity afforded by higher education.

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Sean strikes me as one of those students whose time in the business world prepared him to get the most out of his legal studies.

I got to know Sean as a student in my Fall 2022 Constitutional Law II course. He impressed me well before the final exam. Sean was always well prepared and articulate in class discussion. He often came up after class to ask thoughtful and probing questions. The class was relatively small and stacked with many excellent students, so Sean's B+ for the course reflects a very strong exam performance measured against a daunting curve. He did well on the multiple-choice component of the exam and his essay was well written, thoughtfully analyzing the significant issues raised by the exam hypothetical.

Sean was enrolled this past semester in my State Constitutional Law class. Several judges come to Athens to help teach the course. Chief Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit was in town in February leading a session on his book *51 Imperfect Solutions*. As Judge Sutton interacted with class members, it was clear that he enjoyed his discussion with Sean, who anticipated points the judge's points and helped guide class discussion in fruitful directions.

I have been impressed with Sean's intelligence and analytical skills, as well as his strong sense of ethics. He drew inspiration from his father's commitment to treating patients based on the need for care, whether or not they could afford his services. Before law school, Sean worked with at-risk youth, assisted in resettling Iraqi refugees and helped start a club for preventing relationship abuse.

Sean is a strong clerkship candidate, with the intellectual abilities, experience and practical wisdom to be an excellent clerk. He is respectful and humble and would be a real asset in working through complex legal problems. I believe Sean would perform well in a clerkship and I recommend him highly. Please do not hesitate to contact me at (706) 254-5504 or [rbeck@uga.edu](mailto:rbeck@uga.edu) if I can provide any further information.

Very truly yours,



Randy Beck  
Justice Thomas O. Marshall Chair of Constitutional Law



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**Dan T. Coenen**

*University Professor  
Josiah Meigs Distinguished Teaching Professor  
Harmon W. Caldwell Chair in Constitutional Law*

June 9, 2023

The Honorable Leslie Abrams Gardner  
United States District Court for the Middle District of Georgia  
C.B. King United States Courthouse  
201 West Broad Avenue, 3<sup>rd</sup> Floor  
Albany, Georgia 31701-2566

Dear Judge Gardner:

I write to recommend Sean Klasson, of the University of Georgia Law School. I recommend him to you without the slightest reservation and, indeed, with an all-out enthusiasm about both his capabilities and his character.

I came to know Mr. Klasson while he was a student in my Constitutional Law I class during his second semester in law school. Mr. Klasson came to us from Duke University, where he put together a remarkable program of study, including at the London School of Economics. As a result, it is not a surprise to me that he has performed extremely well as a law student here at UGA. But I must say that I was truly “blown away” by his examination performance in my class. Indeed, it was so strong that he received a grade of A-plus.

Particularly noteworthy with regard to Mr. Klasson’s academic performance is the fact that his grades have risen significantly following his first semester as a law student. In my experience, even though many students face special challenges during the first semester, this level of improvement is noteworthy. The important point is that Mr. Klasson’s record shows his demonstrable and highly commendable success in building on his first-semester experience, and there is every reason to conclude that his later grades provide far more useful information about his overall capabilities than his first-semester grades. In any event, even taking those first-semester grades into account, his overall GPA is outstanding, placing him not far outside the top ten percent of his class. He also now has had the benefit of serving as a member of the Georgia Law Review.

Mr. Klasson is an admirable young man. His role model is his father, who is the sort of “old fashioned” physician who helps every patient who comes his way, regardless of the ability to pay for medical services. Mr. Klasson also has shared with me that a transformational life experience for him came in the form of the sudden onset of a severe, nerve-related orthopedic condition – a condition so extreme in nature that, although he is left-handed, he effectively lost all use of his left arm and left hand for an extended period. This condition led in time to surgery and then to some two years of slow-going rehabilitation, which fortunately resulted in a near-return to his pre-setback

condition. The lesson learned, Mr. Klasson reports, is that life often puts individuals in difficult positions beyond their ability to navigate on their own, thus requiring them to trust others to make critical choices about key features of their lives. Mr. Klasson has shared with me that this foundational understanding, brought home to him in a powerful way through his own lived experience in dealing with a serious physical disability, informs both why and how he seeks to help others through his work in the law.

All my encounters with Mr. Klasson signal to me that he is a first-rate legal analyst. He is unusually bright, highly articulate, and careful and reflective as he processes ideas. Mr. Klasson is also the sort of student who is interested in every field of law and someone who especially enjoys doing legal research. Indeed, I recently decided that I am going to ask Mr. Klasson to do legal research work for me – which is reflective of the extremely high regard in which I hold him because he is the only member of the class of 2024 I am going to seek to engage in this way even though I have taught some 120 members of that class in two separate first-year courses.

I also want to emphasize what a well-rounded person I have found Mr. Klasson to be. He is wise beyond his years, and he is also the sort of warm and down-to-earth individual who will interact in a positive manner with anyone and everyone he meets along the way. In sum, I view Mr. Klasson as an exceptionally well-qualified and entirely deserving candidate, and I recommend him to you in the very strongest terms.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan T. Coenen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Dan T. Coenen

**Brinson Askew Berry**  
BRINSON, ASKEW, BERRY, SEIGLER, RICHARDSON & DAVIS, LLP  
Attorneys at Law

J. Anderson Davis  
706.295.0566  
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June 9, 2023

Honorable Leslie Abrams Gardner  
Chambers of Judge Leslie Abrams Gardner  
201 West Broad Avenue  
Albany, GA 31701

**Re: SEAN M. KLASSON**  
**University of Georgia School of Law**  
**J.D. Candidate, Class of 2024**

Dear Judge Gardner:

It is my honor to recommend Sean Klasson for a judicial clerkship. Sean worked for our firm the summer after his first year as a law clerk. Sean grew up in Rome. I have had the opportunity to observe him since he worked for us. He is an impressive young man, and he has an incredible work ethic.

While clerking for us last summer, Sean has worked on a number of specific items for me including a Home Rule change of the City of Rome's Charter and analyzing and evaluating a multi-national transaction. He also assisted in other research projects involving federal and state litigation and transactional matters. Sean has had the opportunity to attend some of the more mundane aspects of the practice of law including Municipal Court, Probate Court, client meetings, and a development authority meeting. He attended depositions and has been exposed to an overall general practice of law.

In observing and working with Sean we have found that he is very detailed orientated, organized and has very good writing and analytical skills. Sean has not been afraid to take on any task or opportunity. Obviously, his academic credentials justify the application to be a judicial clerk. He is right at the top 10% of the University of Georgia Law School class. His background is interesting and brings a perspective to law school which would make him a well-rounded and suitable clerk. His BS in Economics with a BA in History is impressive but his study abroad at the London School of Economics for a full year term is more impressive. Following undergraduate school, Sean entered the work force where he gained life experiences preparing him for law school.

One of my first encounters with Sean was when I had the opportunity to participate in the University of Georgia School of Law Orientation and Professionalism Program and Sean was a participant in the breakout group I was assigned. Observing him then and now, working with him last summer, I wholeheartedly recommend and support his application. It is truly my pleasure to recommend Sean for any law clerk position. Again, he is a very intelligent young man, willing to take

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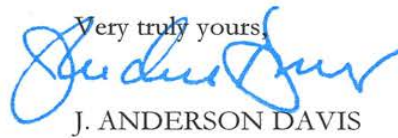
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Honorable Leslie Abrams Gardner  
June 9, 2023  
Page Two

on any task and is an excellent student. Sean will make an excellent lawyer and will be an asset as a law clerk.

If I may be of any assistance or provide any additional information, please do not hesitate to contact me.

Kind regards.

Very truly yours,  
  
J. ANDERSON DAVIS

JAD/cmr

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UNIVERSITY OF  
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David E. Shipley  
*Georgia Athletic Association Professor*  
*Dean, 1998-2003*

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June 12, 2023

The Honorable Leslie Abrams Gardner  
United States District Court for the Middle District of Georgia  
C. B. King United States Courthouse  
201 West Broad Avenue, 3<sup>rd</sup> Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing on behalf of Sean Klasson. He is a third-year student at the University of Georgia School of Law who has applied to you for a clerkship following his graduation in May 2024. He is a fine student, I admire his drive and determination, and I am confident that he will be an excellent clerk.

Sean was in my section of Civil Procedure in the fall semester of the 2021-22 academic year. This is a four-credit, one semester course at Georgia and we met four days each week for 56 total class sessions. Sean sat to my left, was always prepared when I made cold calls, and he volunteered regularly. I was not surprised that he earned one of my A grades. As an aside, we do not have grade inflation at UGA. The average grade for all of our classes with more than 20 students has to fall between a 2.90 and 3.20. I had 68 students in my section of Civil Procedure and their average was a 3.13.

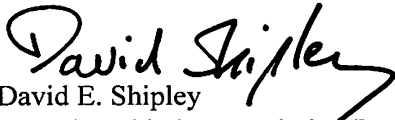
Mr. Klasson's fall semester was solid. He finished with a 3.44 GPA. His spring semester was very strong — a 3.88 that included an A+ in Constitutional Law, two grades of A (Criminal Law and Property), and an A- in Legal Writing II. His low grade was a B+ in Secured Transactions — his elective. These grades plus another solid 2L year brought up his cumulative GPA to a 3.59 and well within the top 25% of his class. He is on the *Georgia Journal of International and Comparative Law*, the recipient of one of our Law School Association Scholarships, and active in several law school organizations.

He is a non-traditional student who earned his BA in History from Duke in 2018, and then worked for a couple of years before coming to UGA in August 2021. He was a Category Specialist for Walmart eCommerce in San Bruno, California. He also was a Legal Intern in the Floyd County District Attorney's Office in his hometown of Rome, Georgia for several months in the summer of 2021. Last summer he worked for the well regarded Brinson Askew firm in that city. This summer he is at the Savannah office of Harris Lowry Manton, a litigation boutique.

I have been a law professor for over 40 years, and have evaluated several thousand students in my career. There is no doubt in my mind that Sean Klasson will be successful in a clerkship and as a

lawyer. I often see Sean around the school, and we often talk. He is fan of college sports and so am I. He is an outgoing young man who gets along well with others, and I am sure everyone in your chambers will like him. I recommend him with enthusiasm. Please contact me if you would like to discuss his application – [shipley@uga.edu](mailto:shipley@uga.edu) or 706-542-5184.

Sincerely,

A handwritten signature in black ink that reads "David Shipley". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

David E. Shipley  
Georgia Athletic Association Professor in Law

Sean Klasson  
32 Forest Meadows Dr., Rome, Georgia, 30165 • smk61624@uga.edu • (706) 331-6856

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### **WRITING SAMPLE**

The attached writing sample is an objective brief I drafted during my clerkship at a firm in Rome, Georgia. The brief addresses potential liability for an LLC and its directors if they were to initiate an amendment to its operating agreement immediately before a sale, when that amendment was solely proposed to effectuate a complete sale of the company and liquidate objecting members.

Only minor formatting changes have been made to the draft that was submitted to the lead lawyer managing case. Identifying information of the parties and attorneys involved has been removed.

**MEMORANDUM**

TO:

FROM: Sean Klasson

DATE: July 8, 2022

RE: LLC Dissenter's Rights, Drag-Along Provisions, & Liability under  
Fiduciary Duty for Amendments

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**QUESTIONS PRESENTED**

1. Does an amendment to the operating agreement of a limited liability company ("LLC") that creates drag-along rights, or the sale of the entire company against the will of a minority member, trigger dissenter's rights under the Georgia LLC Act?

2. If dissenter's rights are triggered under the LLC Act, what are the required procedures and available remedies under Georgia law?

3. Does a drag-along amendment to the operating agreement, the sale of the entire LLC enabled by the invocation of drag-along rights, or the combination of the two acts in rapid succession create any liability for the LLC or its directors under their fiduciary duty to the LLC and its members?

**BRIEF ANSWERS**

1. No. O.G.C.A. § 14-11-1002(a)(3) states that a member is entitled to dissent from the sale of all or substantially all of the property of the LLC if approval of less than all of the members is required by the operating agreement. However, this right does not exist if the sale is for cash that will

be distributed to the members within one year from the date of sale, as will be the case in the potential transaction.

2. If an act of the LLC triggers dissenter's rights under the LLC Act, there is a codified sequence of interactions between the LLC and dissenting members that must take place, beginning with the LLC providing notice of the right to dissent before a vote is taken on the triggering action. But if the LLC abides by all procedural requirements of the LLC Act, the operating agreement, and the articles of organization, the dissenting member may not challenge the act of the LLC itself. *See* O.C.G.A. § 14-11-1002(b). Rather, the dissenting member is limited to receiving payment from the LLC for the fair value of their shares—an amount presumably similar to what they would have received from the sale of the company, if not less.

3. Probably not. There is limited case law on factually similar challenges to an LLC under its fiduciary duty (and none arising out of Georgia), but there is an encouraging case from Delaware that supports the notion that the LLC will not face liability for these actions. Key reasoning from that case can be applied directly to our factual scenario: (a) the parties pursuing an amendment sought advice from counsel and professional financiers prior to acting; and (b) the amendment was motivated by a good faith belief that it would enhance the sale value of the company.

### **STATEMENT OF FACTS**

Our client is an LLC with many members and a valuation between \$140 million and \$160 million. A majority of its members are interested in selling their ownership interests in the company to a prospective buyer. The buyer is only interested in buying a 100% stake in the company. The consideration for the sale of the LLC would be cash provided at closing.

Given the large number of members in the LLC, there is a concern that there may be holdouts. The operating agreement does not provide for drag-along rights as currently constructed. Thus, the holdouts could potentially retain their membership interest and accompanying rights in the LLC in the event of a sale. This issue presents two challenges to the sale process. First, such a scenario directly contravenes the express wishes of the buyer. Second, this may result in a lower price per share—if the purchaser will proceed at all—since most buyers are willing to pay a premium for complete control of a company and its assets.

The majority membership wants to amend the LLC's operating agreement to include drag-along rights in order to address the challenges brought forth in their absence. There is sufficient support amongst members to approve such an amendment and the sale of the company under the terms of the operating agreement. This memo addresses: (a) whether these actions by the LLC give rise to dissenter's rights; (b) what are the procedural

requirements placed on the LLC and the minority member(s) if dissenter's rights are triggered under the LLC Act; and (c) whether these actions place the LLC at risk of liability under its fiduciary duty to its members.

### **DISCUSSION**

1. **Does an amendment to the operating agreement of an LLC introducing drag-along rights, or the sale of the entire company against the will of a minority member, trigger dissenter's rights under the Georgia LLC Act?**

- a. **Georgia Law.**

Article 10 of the LLC Act, O.C.G.A. § 14-11-1001, et seq., sets forth the statutory basis for dissenter's rights and provides default rules that are operative when the operating agreement is silent on the matter. Section 14-11-1002(a) enumerates the LLC actions that trigger dissenter's rights. These actions are:

- (a) merger without unanimous approval;
- (b) a plan of conversion pursuant to Section 14-2-1109.2 or Section 14-11-906;
- (c) the sale or disposition of all or substantially all of the property of the LLC under certain circumstances;
- (d) certain amendments that materially and adversely affect the rights of a dissenter's membership interest in the LLC; and
- (e) any LLC action taken pursuant to a member vote to the extent that the articles of organization or operating agreement provide for the right to dissent.

O.C.G.A. § 14-11-1002(a).

A member is allowed to dissent from the sale of all or substantially all of the property of the LLC if approval of less than all of the members is required by the operating agreement. *See* O.C.G.A. § 14-11-1002(a)(3). The right to dissent does not exist, however, if the cash from the sale will be distributed to the members within one year after the date of sale. *See id.* (“[quote language so it’s clear... or quote the statute in the body of sentence if it would be duplicative to add it in a parenthetical]”).

**b. Analysis.**

If the terms of the sale contemplate a cash distribution to the members within one year from closing, dissenter’s rights will not be triggered by the sale itself. *Id.* The method by which the sale is approved—i.e., unanimous vote versus a non-unanimous majority vote paired with drag-along rights—does not change this analysis.

If the sale of the LLC is not exclusively for cash to be distributed within a year of the sale, then dissenter’s rights will be triggered if the sale is passed using drag-along rights rather than a unanimous vote of the members of the LLC. *Id.* (“[I’d add another quote here so that the reader cannot question the interpretation]”). Section II of this Discussion addresses the procedures that must be followed if dissenter’s rights are triggered.

The other LLC actions that trigger dissenter’s rights are not present in our factual scenario. O.C.G.A. § 14-11-1002(a).

**2. If dissenter's rights are triggered under the LLC Act, what are the procedures and ramifications of dissenter's rights under the statute?**

**a. Georgia Law.**

If an act of the LLC triggers dissenter's rights under the LLC Act, there is a codified sequence of events between the LLC and the dissenting members that must take place, beginning with the LLC providing notice of the right to dissent before a vote is taken on the triggering action, such as the sale of the company's assets. *See* O.C.G.A. § 14-11-1003. Importantly, if the LLC abides by all procedural requirements concerning dissenter's rights under the LLC Act, the operating agreement, and the articles of organization, the dissenting member may not challenge the act of the LLC itself. *See* O.C.G.A. § 14-11-1002(b). Instead, the dissenter's remedy is limited to the LLC paying fair value for their shares. *Id.*

The codified sequence is as follows.

- [Isn't there a pre-action notice requirement? Or is the impetus entirely on the dissenting member?]
- If a record member wishes to assert dissenter's rights, he/she must: (a) deliver written notice to the LLC, before the vote is taken, of his/her intent to demand payment if the action is effected; and (b) must not vote in favor of the proposed action. *See* O.C.G.A. § 14-11-1004.
- Assuming the sale receives the necessary number of votes required by the Act or the Operating Agreement (e.g., super majority or unanimity), the LLC must send a notice to all members who satisfy the requirements of Section 14-11-1004 within 10 days of the LLC action. *See* O.C.G.A. § 14-11-1005. The

notice must state: where the payment demand must be sent; the extent any transfer of membership interests will be restricted after the payment demand is received; and the date that the LLC must receive the payment demand (statutorily 30-60 days after this notice is delivered to the members). *Id.*

- In response, the dissenting member must then demand payment and deposit their certificated membership interests in accordance with the notice described in Section 14-11-1005. *See* O.C.G.A. § 14-11-1006. If the dissenting member fails to do so by the date set in the dissenter's notice, he/she is not entitled to payment for his/her membership interest. *Id.*<sup>1</sup>
- After receiving the dissenter's demand, the LLC must then offer to pay each dissenter who complied with Section 14-11-1006 fair value of their shares plus accrued interest within 10 days of receipt of the demand. *See* O.C.G.A. § 14-11-1008.

If the LLC action doesn't take place within 60 days of the payment demand, the LLC shall return the deposited certificates and release transfer restriction. *See* O.C.G.A. § 14-11-1009. If the LLC takes the action after 60 days, the process begins anew with dissenters' notice and payment demands. *Id.* The remaining statutory provisions (§ 14-11-10010 through § 14-11-1013) discuss the procedure if there is a disagreement over fair value, including the judicial process and the limitations on dissenting. If the parties cannot agree on fair value, the LLC shall commence a proceeding, which shall be a nonjury

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<sup>1</sup> The LLC may restrict the transfer of uncertificated membership interests from the date the demand for payment is received until the LLC action is taken or restrictions released. O.C.G.A. § 14-11-1007. The restricted member retains all other rights of a member. *Id.*

equitable valuation proceeding, in the superior court of the county where a limited liability company's registered office is located. O.C.G.A. § 14-11-1011.

**b. Analysis.**

Dissenter's rights typically progress along an expedited timeline; if the LLC provides proper notice, the process should be completed within 90 days. But O.C.G.A. § 14-11-1013 provides a three-year statute of limitations following the LLC action, with the language seeming to accommodate for an LLC's failure to comply with Sections 14-11-1003 and 14-11-1005. The three-year statute of limitation underscores the importance of the LLC giving timely, proper notice of dissenter's rights to its members; otherwise, it has a lingering liability that likely hinders any sale of the company.

Assuming procedure is correctly followed, there is little risk to the company through dissenter's rights for selling the company using drag-along rights, even if we assume that the sale itself triggers dissenter's rights (which is unlikely). There is little incentive for a minority member to dissent to the transaction. At the expense of additional steps and potential judicial mediation, the dissenting member will receive fair value for their shares—in other words, exactly what they should receive from a sale of the company.

Beyond lingering liability, there is further risk to the LLC for failure to abide by the terms of the LLC Act, the operating agreement, and the articles of incorporation. § 14-11-1002(b) protects the company by stating that the

dissenting member may not challenge the act of the LLC itself if the operative terms and procedures are abided by. The implicit assumption from the LLC Act is that the dissenting member may challenge the act itself if the LLC fails to perform its required functions. There is no statutory language in the LLC Act describing how a member may challenge an act of the LLC, but the Act leaves open the possibility of such a challenge.

**3. Does either the amendment to the operating agreement, the prospective sale of the LLC, or the combination of the two acts in rapid succession create any liability for the directors or majority members of the LLC?**

**a. Relevant Law.**

The LLC Act describes the fiduciary duties of members and managers: “[a] member or manager shall act in a manner he or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” O.C.G.A. § 14-11-305. But “to invoke the rule's protection, directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them.” *Minnesota Invco of RSA No. 7, Inc. v. Midwest Wireless Holdings LLC*, 903 A.2d 786, 797 (Del. Ch. 2006). The operating agreement of an LLC may expand or constrict the fiduciary duty of members or managers of the LLC, subject to ethical baselines that cannot be contracted around. *Id.*

Establishing a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach. *Wells Fargo Bank, N.A. v. Cook*, 775 S.E.2d 199, 206 (Ga. App. 2015). Proof of damages is an essential element to a claim for breach of a fiduciary duty, and “[a] failure to prove damages is fatal to a plaintiff's claim. *Niloy & Rohan, LLC v. Sechler*, 782 S.E.2d 293, 296-97 (Ga. App. 2016).

Based on my research, there is no reported Georgia decision on point. Thus, this would be a case of first impression, creating a degree of uncertainty as to exactly what a court may do based on this fact pattern. But there is instructive case law from Delaware, where the Chancery Court held that directors and/or majority members of an LLC do not breach their fiduciary duties to the minority members by amending the operating agreement in conjunction with the sale of the company's units. *Minnesota Invco of RSA No. 7, Inc.*, 903 A.2d at 786.

There, a Delaware LLC that was originally formed in 1995 amended its operating agreement in 1999. The new agreement introduced several new provisions, including: (a) drag-along and tag-along rights; (b) a provision stating that the minority must reasonably comply with sale procedure if forced via the drag-along provision; (c) a conflict provision; (d) and a broad

integration clause. The 1999 amendment did not delete or otherwise revise a broad right of refusal contained in the 1995 operating agreement.

In 2005, during the process of selling the company, several potential buyers brought forth concerns about a lingering right of first refusal in the minority. Thus, six days before a sale was approved by 97% of the membership, the members amended the operating agreement again—this time to terminate any right of first refusal amongst members. The minority sued for specific performance of their right of first refusal and claimed that the board members breached their fiduciary duty and duty of loyalty by authorizing the amendment.

The court held that the integration clause and conflict provision from 1999 effectively rendered the right of first refusal obsolete. *Minnesota Invco of RSA No. 7, Inc.*, 903 A.2d at 798. The court further stated that the board did not breach its fiduciary duty by relying upon the advice of counsel and their bank to amend the operating agreement, and found that they were acting “with the good faith belief that the amendment would provide prospective bidders with additional assurances in order to maximize the sale price for [defendant] and get the best possible value for its unit holders and [plaintiff].” *Id.* at 797. Therefore, the LLC and its members and managers did not breach any fiduciary duty or duty of loyalty by amending their operating agreement immediately prior to the sale of the company.

### c. Analysis

On its face, there is nothing within the language of the LLC Act's depiction of fiduciary duty that would implicate the contemplated amendment and sale as a breach of that duty (under the facts provided). Furthermore, it would be difficult to prove damage to the plaintiff from what should be a profitable sale of their membership interest. Nevertheless, it would be prudent to review the operating agreement to ensure that the fiduciary duty of its members and managers have not been altered from the default standard.

In *Minnesota Invco of RSA No. 7, Inc.*, minority members claimed that the majority had breached its fiduciary duty when they amended the operating agreement less than a week before the sale was approved. The LLC's actions passed scrutiny because the majority relied on counsel and professional advice, as well as an informed belief that the amendment would lead to a higher sale price. These arguments are analogous to those that would be presented in any potential litigation in this matter. For example, the fact that I am writing this memo supports the notion that the LLC is taking ample precaution to ensure that they are informed in their decision-making. The potential buyer's expressed intent to buy 100% of the membership interests of the company and their refusal to consider anything

less likewise supports the notion that the drag-along amendment would increase the valuation of each share of the LLC in a sale.

A potential argument that a minority member could make—distinguishing *Minnesota Invco of RSA No. 7, Inc.* from this fact pattern—is that the majority here is not terminating a right of first refusal. Instead, they would be creating a previously non-existent drag-along right that would materially alter the ability of members to retain their interest in the LLC. But this may be a difference without substance because the Operating Agreement at issue expressly states that it may be amended with a vote of two-thirds or more of the members. Assuming that occurs and all material facts are disclosed to the members prior to voting on the drag-along rights—including its specific connection to the potential transaction—then this risk is likely ameliorated.

### **CONCLUSION**

It does not appear that either an amendment creating drag-along rights or the sale of the entire LLC will trigger dissenter's rights, unless the sale of the company is for consideration other than exclusively cash to be distributed within a year from the date of sale. Article Ten of the LLC Act sets forth a codified sequence of interaction between the LLC and any dissenting member(s) if dissenter's rights are triggered and the member seeks to be paid fair value for their shares. This sequence occurs on a strict timeline that will

be concluded within 90 days, unless the LLC fails to follow the procedures laid out in the LLC Act, the operating agreement, and the articles of incorporation.

The LLC will likely not face any liability under its fiduciary duty to its members for the amendment, the sale, or the sale immediately following the approval of the amendment. However, this would be a case of first impression in Georgia, so there is uncertainty regarding how a court may address such potential litigation.

## Applicant Details

First Name **Sam**  
 Middle Initial **A**  
 Last Name **Krevlin**  
 Citizenship Status **U. S. Citizen**  
 Email Address [samkrevlin@gmail.com](mailto:samkrevlin@gmail.com)

Address
Street
<b>2 Cooper Sq, Apt 2E</b>
City
<b>New York</b>
State/Territory
<b>New York</b>
Zip
<b>10003</b>
Country
<b>United States</b>

Contact Phone Number **9177634123**

## Applicant Education

BA/BS From **Northwestern University**  
 Date of BA/BS **June 2019**  
 JD/LLB From **New York University School of Law**  
<https://www.law.nyu.edu>  
 Date of JD/LLB **May 17, 2023**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **NYU Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Marden Moot Court**

## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Azmy, Baher  
BAzmy@ccrjustice.org  
212-614-6464  
Bauer, Robert  
rb172@nyu.edu  
202.434.1602  
Eisenberg, Daniel  
eisenbergdm@gmail.com  
(212) 763-5003  
Kennedy, David  
David.Kennedy2@usdoj.gov  
212-637-2733

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Sam Aaron Krevlin  
2 Cooper Square  
New York, NY 10003

April 15, 2023

The Honorable Leslie Abrams Gardner  
United States District Court  
Middle District of Georgia  
C.B. King United States Courthouse  
201 West Broad Avenue, 3rd Floor  
Albany, Georgia 31701-2566

Dear Judge Gardner,

I am a third-year student at New York University School of Law where I serve as an executive editor of the *NYU Law Review*. Following graduation, I will be a litigation associate at Mayer Brown. I am writing to express my interest in a clerkship for the 2024-2026 term.

Having worked for Senator Jon Ossoff on the Senate Permanent Subcommittee on Investigations, I am especially eager to clerk in Georgia. During my time as a law clerk for the Senator, my team focused on tackling many civil rights issues pertaining to the judicial system in Georgia, including the lack of a public defender's office in the Southern District. I hope I can continue to explore complex legal issues in Georgia as a judicial clerk in your chambers.

In addition to working in private practice, I have a strong commitment to public service and have worked in both the executive and legislative branches of government.

Prior to my work in the Senate, I served as an extern with the U.S. Attorney's Office for the Southern District of New York where I worked on a diverse docket of civil cases including financial fraud, tort claims, and civil rights. With the Southern District, I participated in various stages of litigation from initial conference, through trial, and on appeal. I prepared depositions, drafted complaints and answers, reviewed documents, and wrote memoranda of law.

After my 1L year, I interned within the Voting Rights division of the Lawyers' Committee for Civil Rights Under Law where I focused on partisan gerrymandering and how it is designed to suppress the voting power of marginalized communities.

Enclosed please find my resume, transcripts, and writing sample.

Under separate cover, you will find letters of recommendation from (1) Professor of Civil Rights and Legal Director for the Center for Constitutional Rights Baher Azmy, (2) Clinical Professor and Former White House Counsel Bob Bauer, (3) Clinical Professor and Chief of the Civil Rights Unit at the U.S. Attorney's Office for the Southern District of New York David Kennedy, and (4) Former Chief Counsel of PSI Dan Eisenberg.

Please feel free to contact me by email ([samkrevlin@gmail.com](mailto:samkrevlin@gmail.com)) or phone (917-763-4123) for additional information. I hope to have the opportunity to interview in Albany.

Respectfully,

Sam Krevlin

**SAM A. KREVLIN**

2 Cooper Square, Apt #2E, New York, NY 10003  
(917) 763-4123 | samkrevlin@gmail.com

**EDUCATION**

**NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY**

Candidate for J.D., May 2023

Honors: *NYU Law Review*, Executive Editor

Activities: Marden Moot Court, Competitor; Public Interest Law Student Association, Board Member

**NORTHWESTERN UNIVERSITY, MEDILL SCHOOL OF JOURNALISM, Evanston, IL**

B.S. in Journalism and B.A. in Political Science, June 2019

Honors: Commencement Speaker at Medill Graduation (Chosen by faculty)

Activities: *Daily Northwestern*, State Politics Beat Reporter

**EXPERIENCE**

**MAYER BROWN, New York, NY**

*Associate*, Fall 2023; *Summer Associate*, May – July 2022

Wrote a declaration for an Afghan woman seeking refuge from the Taliban. Drafted a motion to exclude expert testimony in a contract dispute. Updated clients on sanctions imposed against Russia by the United States.

**SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, Washington DC**

*Law Clerk for Senator Jon Ossoff*, August – December 2022

Investigated civil rights abuses within federal prisons. Helped secure bipartisan support through political and legal negotiations. Drafted sections of an executive report on sexual abuse in federal prisons. Prepared Senator Ossoff before public hearings. Proposed two investigations for the Senator to initiate next term.

**CIVIL LITIGATION DIVISION AT U.S. ATTORNEY'S OFFICE, S.D.N.Y., New York, NY**

*NYU Clinical Extern*, January – May 2022

Assisted for two AUSAs in both affirmative and defensive litigation by preparing depositions, writing complaints and answers, reviewing documents, and drafting memoranda of law. Prepared for oral arguments involving a request for documents from U.S. Immigration and Customs Enforcement.

**LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, DC**

*Voting Rights Project Intern*, June – July 2021

Prepared the Committee for oral and written testimony on Texas redistricting. Wrote a memo on the application of the Purcell Principle. Advised the policy team on democratic reforms to the electoral process.

**KAMALA HARRIS FOR THE PEOPLE, Spartanburg, SC**

*Field Organizer*, July – December 2019

Built and oversaw field operations in three rural counties. Managed volunteer training, recruitment, and phonebanks. Secured endorsements from community groups, faith-based leaders, and elected officials. Recruited and led a team of eight volunteer captains who exceeded weekly goals.

**BLOOMBERG PHILANTHROPIES, New York, NY**

*Communications Intern*, June – September 2018

Created video content across education, public health, government innovation, and the arts. Curated content for the Global Business Forum, which gathers world leaders and CEOs to discuss trade policy and innovation.

**MEDILL JUSTICE PROJECT, Evanston, IL**

*Investigative Reporter*, March – September 2018

Led an investigation leading to the freedom of a wrongfully convicted man. Reviewed and analyzed court documents and police records. Conducted weekly interviews with inmate. Pursued and questioned witnesses and law enforcement officials. Co-authored a front-page story featured in the *Detroit Free Press*.

**ADDITIONAL INFORMATION**

Working knowledge of Spanish. Studied abroad in Copenhagen, Denmark and Beijing, China. Marathon runner and former club tennis player.

Name: Sam A Krevlin  
 Print Date: 02/11/2023  
 Student ID: N12399409  
 Institution ID: 002785  
 Page: 1 of 1

**New York University  
 Beginning of School of Law Record**

**Fall 2020**

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Stratos N Pahis				
Torts	LAW-LW 11275	4.0	B	
Instructor: Eleanor M Fox				
Procedure	LAW-LW 11650	5.0	B+	
Instructor: Helen Hershkoff				
Contracts	LAW-LW 11672	4.0	B	
Instructor: Kevin E Davis				
1L Reading Group	LAW-LW 12339	0.0	CR	
Topic: Baseball as a Road to God				
Instructor: John Sexton				
	AHRS	EHRS		
Current	15.5	15.5		
Cumulative	15.5	15.5		

**Spring 2021**

School of Law Juris Doctor Major: Law				
Constitutional Law	LAW-LW 10598	4.0	B+	
Instructor: Trevor W Morrison				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Stratos N Pahis				
Legislation and the Regulatory State	LAW-LW 10925	4.0	B	
Instructor: Adam B Cox				
Criminal Law	LAW-LW 11147	4.0	B	
Instructor: Avani Mehta Sood				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: John Sexton				
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR	
	AHRS	EHRS		
Current	14.5	14.5		
Cumulative	30.0	30.0		

**Fall 2021**

School of Law Juris Doctor Major: Law				
Civil Rights	LAW-LW 10265	4.0	A-	
Instructor: Baher A Azmy				
Corporations	LAW-LW 10644	5.0	A-	
Instructor: Robert Jackson				
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	3.0	B+	
Instructor: Stephen Gillers				
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR	
Teaching Assistant	LAW-LW 11608	2.0	CR	
Instructor: Juan P Caballero				
	AHRS	EHRS		
Current	15.0	15.0		
Cumulative	45.0	45.0		

**Spring 2022**

School of Law  
 Juris Doctor  
 Major: Law

Evidence	LAW-LW 11607	4.0	A-	
Instructor: Daniel J Capra				
Colloquium on Law and Security	LAW-LW 11698	2.0	A-	
Instructor: Stephen Holmes				
David M Golove				
Rachel Anne Goldbrenner				
Government Civil Litigation Externship - Southern District	LAW-LW 11701	3.0	A	
Instructor: David Joseph Kennedy				
Rebecca Tinio				
Government Civil Litigation Externship - Southern District Seminar	LAW-LW 11895	2.0	A-	
Instructor: David Joseph Kennedy				
Rebecca Tinio				
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	B+	
Instructor: Preet Bharara				
	AHRS	EHRS		
Current	13.0	13.0		
Cumulative	58.0	58.0		

**Fall 2022**

School of Law Juris Doctor Major: Law				
Legislative and Regulatory Process Clinic	LAW-LW 12230	8.0	A	
Instructor: Sally Katzen Dyk				
Robert Bauer				
Legislative and Regulatory Process Clinic Seminar	LAW-LW 12231	6.0	IP	
Instructor: Sally Katzen Dyk				
Robert Bauer				
	AHRS	EHRS		
Current	14.0	8.0		
Cumulative	72.0	66.0		

**Spring 2023**

School of Law Juris Doctor Major: Law				
Sports Law	LAW-LW 10585	3.0	***	
Instructor: Jodi Saposnick Balsam				
Law Review	LAW-LW 11187	2.0	***	
Federal Courts and the Federal System	LAW-LW 11722	4.0	***	
Instructor: Helen Hershkoff				
Property	LAW-LW 11783	4.0	***	
Instructor: Katrina M Wyman				
	AHRS	EHRS		
Current	13.0	0.0		
Cumulative	85.0	66.0		

**End of School of Law Record**



March 16, 2023

**RE: Sam Krevlin, NYU Law '23**

Your Honor:

I am the Legal Director of the Center for Constitutional Rights (CCR), a national impact litigation and advocacy organization, where I supervise work related to racial justice, prisoners' rights, immigrants' rights, LGBTQI+ rights, and rights of Guantanamo detainees and victims of torture. Prior to this position, I was a tenured law professor at Seton Hall Law School, where I taught Constitutional Law for ten years and directed a Constitutional Law Clinic. Currently, I am an Adjunct Professor at NYU and Yale Law Schools, where I teach an intensive course on Civil Rights Law.

I am writing to support the application of Sam Krevlin for a clerkship in your chambers. Sam was a student in an intensive four-credit Civil Rights Law course I taught at NYU in the Fall 2021 –covering theory and practice of Section 1983, *Bivens*, immunities and defenses for state, municipal and federal actors, modes of liability under *Monell*, other Reconstruction-era civil rights statutes (1981, 1982, 1985(3)), standing and damages (all of which would be an important knowledge base for a clerkship). Throughout the semester in class, Sam revealed himself to be quick and fluid in discussing complex doctrinal materials and had a positive ability to see connections among doctrinal threads we studied weeks or months apart. When on call, he presented the material with lucidity, reflection and careful recall. He has a thoughtful communication style that seems to reflect self-awareness, maturity and an appropriate balance between rigorous attention to detail and interest in political-legal context. I reviewed his exam which was excellent, even by NYU standards: clear, unlabored writing and analysis.

Sam brings a deep passion for the possibility of law to drive positive social change and presents himself with humility about learning legal doctrine and legal strategy. I was consistently impressed with the curiosity behind his questions – that came for a genuine thirst for understanding and appreciation of nuance.

On an interpersonal level, he is kind, mature and collegial. I believe he would make a productive and positive contribution to your chambers and urge you to give him consideration.

Very truly yours,

/s/ *Baher Azmy*

Baher Azmy

666 broadway, 7 fl, new york, ny 10012  
t 212 614 6464 f 212 614 6499 [www.CCRjustice.org](http://www.CCRjustice.org)


**New York University**
*A private university in the public service*

School of Law

40 Washington Square South, Room 425

New York, New York 10012-1099

Telephone: (212) 998-6612

E-mail: robert.bauer@nyu.edu

**Bob Bauer**
*Distinguished Scholar in Residence and Senior Lecturer*
*Co-Director of the Legislative and Regulatory Process Clinic*

March 8, 2023

**RE: Sam Krevlin, NYU Law '23**

Your Honor:

I am a member of the faculty at the New York University School of Law, and I am very pleased to recommend one of my students, Sam Krevlin, for a clerkship in your chambers.

Sam was an outstanding student in the Fall 2022 Legislative and Regulatory Process Clinic, which I co-direct along with Professor Sally Katzen. The semester offers students, admitted on application, an opportunity to learn through full-time externships about the various roles of lawyers in advising on, supporting and influencing the policymaking process in the federal government. We work with them in an academic setting in three-hour weekly seminars and, through ongoing contact with their workplace supervisors, monitor their performance in their lawyering support roles. At the end of the semester, the students submit a 20 to 25 page paper on an approved topic.

Sam excelled. He was accepted into a position on the U.S. Senate's Permanent Subcommittee on Investigations, chaired by Senator Jon Ossoff of Georgia. The office had the highest praise for the quality of his work. The clinical experience is intensive, requiring students to support the office as they would if they were permanent staff, and Sam was credited with making significant contributions. These included his recommendations at the end of his externship for potential areas for investigative focus in the next session. His work earned him an "A" for this graded element of the clinic.

In class, Sam was also a top performer. At the time of this writing, Sam and the other students are just submitting the final versions of their papers. However, I can certainly say that based upon the draft and his class contributions, he will do exceedingly well in his graded academic work.

Sam is thoughtful, careful in the framing of questions and comments, curious, and probing in exploring all sides of an issue. We always look for a student's capacity to listen carefully to the views of others and to respond constructively. Sam was a delightful and stimulating participant in our discussions.

Sam Krevlin, NYU Law '23  
March 8, 2023  
Page 2

For all of these reasons, I can unreservedly recommend Sam for a clerkship, and I would be pleased to answer any questions you have or provide any other information helpful to your consideration of Sam's clerkship candidacy.

Respectfully,

A handwritten signature in black ink, appearing to read 'R. Bauer', with a long horizontal stroke extending to the right.

Robert F. Bauer

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 ANDREW K. JONDAHL  
 SANA MAYAT  
 HARVEY PRAGER  
 VIVAKE PRASAD  
 MAX SELVER  
 EMILY K. WANGER

March 20, 2023

Your Honor:

It is my pleasure to write in high recommendation of Sam Krevlin for a clerkship in your chambers. I supervised Sam while he served as a full-time law clerk for the U.S. Senate Permanent Subcommittee on Investigations (“PSI”), the primary investigative body of the U.S. Senate, during his first semester of 2L. At the time, I was the Deputy Staff Director & Senior Counsel; I have since returned to private practice in New York. Sam was our best law clerk during my nearly two years with PSI. He is a skilled writer with an impressive work ethic, fidelity to sound logic, and great judgment. His emotional intelligence, maturity, and curiosity set him apart from the many talented law students out there.

Our mandate at PSI was to conceive of and execute bipartisan civil rights-oriented investigations that held corrupt or negligent leaders to account and established a factual predicate for reforms. We did this by interviewing witnesses, requesting and analyzing non-public information from federal agencies and private companies, issuing bipartisan reports with findings, and holding Congressional hearings. This work was difficult. We had to find that sliver of the Venn diagram overlap between how we, in the Majority, understood the facts we uncovered and how our counterparts in the Minority did. We had no one to adjudicate what were essentially discovery disputes, and were left to our own devices to find creative ways of exerting pressure on federal agencies and creating our record. We had a shoestring budget. For most of my months-long investigations, it was just me and a junior attorney.

Sam dove in from the get-go. He brought enthusiasm and intensity to his work, quickly learning the rhythm of Congressional investigations. He came in early and stayed late, found ways to be helpful, and did more than what he was asked. I recall numerous instances—particularly for our investigation into the sexual abuse of female prisoners in Federal Bureau of Prisons facilities—where he conducted quick and thorough legal research into matters of Constitutional law, drafted memoranda that efficiently identified the crux of the issues, identified new investigative leads, and drafted sections of our bipartisan report ultimately published in conjunction with our December 2022 hearing featuring survivors of abuse, the Inspector General for the Department of Justice, and the Director of the Federal Bureau of Prisons. When it came to review sensitive documents *in camera* at the Department of Justice on the morning of the

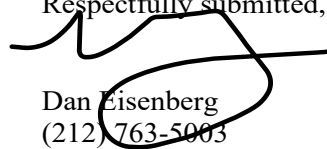
EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP  
Page 2

Thanksgiving holiday, Sam was with us. When my analysis rested on a faulty premise, Sam told me so, respectfully, of course. It was invaluable to have a partner like Sam in the trenches with me. His motor, good attitude, and dedication were invaluable.

One of Sam's greatest strengths is the ability to see the big picture, situating his work in the scheme of institutional interactions between the legislative and executive branches or some broader legal or political strategy. This allows him to add value on his own initiative. For example, after learning our criteria for a viable investigation, he proposed a new one that, at least by the time I left the Senate, had been set into motion. I am not aware of any other law clerk-directed investigation.

Thinking back to my own time as a law clerk for a District Judge in the Southern District of New York, I have every confidence that Sam would thrive in this role. I recommend him without reservation. Please do not hesitate to contact me should you wish to discuss these matters. I would be glad for the chance to sing Sam's praises.

Respectfully submitted,



Dan Eisenberg  
(212) 763-5003



## U.S. Department of Justice

*United States Attorney  
Southern District of New York*

*86 Chambers Street, 3rd Floor  
New York, NY 10007*

February 21, 2023

Re: *Recommendation of Sam Krevlin*

Dear Judge:

I am writing to recommend Sam Krevlin for a clerkship in your Chambers. Sam interned with Assistant United States Attorneys in our Civil Division during the Spring 2022 semester as part of New York University Law School's Government Civil Litigation Clinic. I co-teach the class, which meets for two hours a week for classroom discussion, and keep apprised of the approximately twelve to fifteen hours of work per week done by the interns with their assigned AUSAs. Prior to becoming an Assistant United States Attorney in 2000, I clerked for the Hon. Kimba M. Wood of the Southern District of New York, and the Hon. Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit. Based on my own years as a law clerk, my classroom experience with Sam, and my discussions of him with the AUSAs for whom he worked, I believe that Sam would make an excellent law clerk.

Sam is smart, perceptive, and hard-working. As a budding litigator, Sam sees things pragmatically, and presents legal arguments in a down-to-earth manner. In reviewing Sam's law school transcript, it is striking that his strongest performance came when his coursework transitioned away from doctrinal classes and toward more practical work. Sam's best performances in the clinic came when he was able to present orally, as Sam demonstrates a solid grasp of the facts and law and speaks fluidly and confidently. In particular, he gave a compelling mock opening in a False Claims Act case involving Medicaid/Medicare fraud by a major pharmaceutical company, the most difficult of the opening argument assignments that we give to students, on account of the complexity of the case, the vast amount of information that needs to be synthesized into a brief, ten-minute presentation, and the fact that the conduct of his client at first seems to be completely unsympathetic. For the writing assignment in the class, a mock reply brief to a summary judgment motion, Sam's work was pithy, sharp, effective, and persuasive — most of the criticisms that my co-teacher and I had on his paper related to matters of form that students frequently encounter when writing a reply brief for the first time, specifically that preliminary statements on reply should be very short, and a statement of facts is generally unnecessary. These issues can be readily addressed, but the acuity and fluidity that Sam displays in his written work are much harder to learn.

In addition to the seminar, Sam was assigned to work with two AUSAs. One aspect of the clinic that challenges law students is that AUSAs are typically working on numerous complex matters simultaneously. To keep on top of the work, an intern must be able to address questions as they arise under very different statutes and involving wildly disparate facts, all while keeping

two different supervisors operating under tight deadlines happy. Sam's AUSA supervisors characterized him as "fantastic" and "my favorite intern yet," based upon his engagement with the work of the Office, his eagerness to take on assignments and attend court conferences and depositions, his rapid turnaround on projects, and his conscientiousness in checking in to obtain additional assignments. In addition, after the seminar concluded, Sam went to work for the Senate Permanent Subcommittee on Investigations in Washington, D.C. where, it turns out, he happened to work for a period of time with a former AUSA from this Office. That former AUSA, who was one of the toughest critics of interns that I assigned him while he was in the Office, advised me that he was also favorably impressed with Sam in the time that they worked together.

For all of these reasons, I strongly recommend Sam as a law clerk. Please do not hesitate to contact me at the number below if you have any further questions.

Sincerely,

\s\ David J. Kennedy  
David J. Kennedy  
Assistant United States Attorney  
Tel. No. (212) 637-2733  
Fax No. (212) 637-0033

*Note: This writing sample was submitted for a class in conjunction with the Civil Division at the U.S. Attorney's Office for the Southern District of New York. I was assigned to write a reply to the Government's motion for summary judgement. The writing sample incorporates feedback from the professors of the seminar by addressing the collateral estoppel and res judicata arguments first and combining those arguments into one section.*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
ROBERT CARVAJAL,

Plaintiff,

- against -

HUGH DUNLEAVY, in his Individual and  
Official Capacities, DON MIHALEK, in his  
Individual and Official Capacities, TIMOTHY  
RAYMOND, in his Individual and Official  
Capacities, TOM RIZZO, in his Individual  
Capacity, DANIEL HUGHES, in his Individual  
Capacity, TREVA LAWRENCE, in his  
Individual Capacity, JOHN TANI, in his  
Individual Capacity, and DON McGEE, in his  
Individual Capacity,

Defendants.

-----X

REPLY MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

THE LAW OFFICE OF SAM KREVLIN  
40 WASHINGTON SQ  
NEW YORK, NY 10012  
Telephone: (917) 763-4123

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Plaintiff respectfully submits this reply memorandum of law in opposition to the Government's motion for summary judgment.

### **PRELIMINARY STATEMENT**

Robert Carvajal ("Plaintiff") is a victim of a botched and ill-prepared raid in which Secret Service Agents ("Agents") resorted to deadly and unjustifiable force only seconds after entering the apartment front door. The Agents shot at Mr. Carvajal knowing persons unaffiliated with a money laundering operation may have resided in the home. Because of Defendants' deliberate indifference to Mr. Carvajal's life, he may never obtain the physical or mental strength to engage in the same forms of employment or recreational activity as he once did.

Mr. Carvajal brought this action against the Agents in their individual capacities under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Despite the strength of Mr. Carvajal's claim, the Government has taken the unusual step of moving for summary judgment before discovery has commenced. To grant the motion before any discovery would allow the blatant use of excessive and unjustifiable force to stand without any repercussions. Granting summary judgment is especially unwarranted, premature, and contrary to our system of justice because genuine issues of material fact remain.

Although every material fact is in dispute, the Government makes three arguments in its motion for summary judgement: (1) under the doctrine of collateral estoppel; (2) under the doctrine of *res judicata*; and (3) under the doctrine of qualified immunity.

The collateral estoppel and *res judicata* arguments fail because the amount of force used by Defendants in executing the warrant was never at issue when parties litigated a motion to suppress evidence. Thus, certain issues raised by Plaintiff in this action have never before been

litigated. Testimony on force given at earlier proceedings paint an incomplete picture of the day's events.

Lastly, the qualified immunity argument also fails because Defendants' use of deadly force was clearly excessive. No reasonable factfinder could conclude that Defendants were acting reasonably under the circumstances and "[t]he obvious cruelty inherent in [Defendants' actions] should have provided some notice that their alleged conduct" was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 745 (2002).

**STATEMENT OF FACTS**

Plaintiff Robert Carvajal received three gun-shot wounds and nearly died at the hands of Secret Service Agents. Guns drawn with a “shoot first, think later” approach to policing, Secret Service Agents thought little of Fourth Amendment protections when they charged through the door with a battering ram at 6:00 AM on February 9, 2004. To make matters worse, Secret Service Agents were never authorized to arrest Mr. Carvajal. Rather, the arrest warrant was for Joseph Carvajal, the brother of Mr. Carvajal. (Hr. 108).

Since late 2003, the Secret Service had been investigating Joseph Carvajal for counterfeiting currency and narcotics distribution. (Trial Tr. at 225-26, 280-81). With the help of Mark Crump, a confidential informant who was promised leniency in return for information, the Secret Service began to surveil Joseph Carvajal’s activity through telephone conversations and in-person meetings. (*Id.*). Throughout the investigation, the Secret Service only encountered Mr. Carvajal one time and no illegal activity occurred. (Trial Tr. at 233). Prior to the raid, Mr. Carvajal had no criminal history. (Compl. at 3).

At 6:00 AM on February 9, 2004, the Agents bulldozed through the front door of Joseph Carvajal’s apartment. Upon hearing the battering ram, Mr. Carvajal woke up and walked towards the front door. Then, without any warning from the Agents, Mr. Carvajal was shot and dropped immediately to the floor. After falling to the ground, a second shot was fired.

Agent Mihalek testified that there were “two individuals in the back of the apartment, one individual in front holding a gun, the other individual in the back holding a large object. They moved from my right to my left to where the first two agents were headed into the kitchen-dining room area.” (Tr. 252). Mihalek testified that he shot Mr. Carvajal as he headed towards the kitchen to discard both a gun and printer through an open window. (Tr. 253).

The evidence does not corroborate Mihalek's version of events. Agents outside the building observed a gun and printer fall nine seconds after the first shot was fired. (Tr. 334). Thus, according to the Government's version of events, Mr. Carvajal (after suffering multiple bullet wounds) had the physical fortitude to walk across the apartment, throw two heavy objects out of a window, and return to where he was treated by police.

Mr. Carvajal is alive after being shot multiple times but still suffers permanent physical and emotional injuries.

### ARGUMENT

#### I. THE DOCTRINES OF COLLATERAL ESTOPPEL AND *RES JUDICATA* DO NOT APPLY IN THIS CASE

The Government argues that Plaintiff is collaterally estopped from litigating certain issues in this case because those issues were supposedly litigated in a motion to suppress evidence. This argument fails because the issues decided in that case have no bearing on the current one. The Government cites Judge Hellerstein's finding that the search complied with the Fourth Amendment because the Agents had a "reasonable suspicion of exigent circumstances" given the fact that they were searching for easily disposable items. See United States v. Banks, 540 U.S. 31 (2003); Hearing Tr. at 97-98, 109-10.

However, the suppression hearing pertained to the items recovered as a result of the executed search warrant. The trial court judge only made determinations on the validity of the search warrant and seizure of the items. Judge Hellerstein did not decide or even evaluate the issue of excessive force.

The Government mischaracterizes the earlier hearing. If anything, Judge Hellerstein was sympathetic towards Mr. Carvajal's claim of excessive force. The Judge found that excessive

force likely existed but did not make a final ruling on the issue because it was not the proper forum to do so.

Judge Hellerstein said that

“[i]f there’s any impropriety with regard to the firing of the weapons, then maybe it’s the subject of a different proceedings [sic], but they’re not grounds to suppress anything that was seized. And in the context of the entry, a lot more information would have to be presented in relationship to that which the officers considered reasonable in the circumstance in terms of their reasonable fears and their reasonable cautions.” (Hr. 108-9)

Judge Hellerstein’s opinion aligns with Mr. Carvajal’s belief that excessive force has yet to be litigated and the prior hearing was not the proper venue to make such a claim. Other courts agree with Judge Hellerstein’s assessment. See e.g., Weinmann v. McClone, 138 F. Supp 3d. 1043, 1046 (E.D. Wis. 2015) (holding that excessive force was not actually litigated in a motion to suppress on the reasonableness of entering a garage without a warrant).

The purpose of collateral estoppel is to ensure that parties do not relitigate legal or factual issues in a second proceeding when the issue was already “actually litigated” and “actually decided.” Because Judge Hellerstein specifically acknowledged that the issue of excessive force was not “actually decided,” the Government’s claim is without merit. Grieve v. Tamerin, 269 F.3d 149, 153 (2d Cir. 2001).

The question of *res judicata* is whether the litigant had the opportunity to obtain review of a contested issue in the earlier proceeding. See, e.g., Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) (“A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”).

The Government faults Mr. Carvajal because he did not raise excessive force claims in his underlying criminal proceeding. They claim it should have been raised because excessive

force arises from the same “nucleus of operative fact.” Waldman v. Village of Kiryas Joel, 207 F.3d 105, 108 (2d Cir. 2000).

The same argument that applies to collateral estoppel applies to *res judicata*. Excessive force was not decided in the earlier proceeding. Furthermore, Mr. Carvajal raised the issue of excessive force as it related to the seizure of items in the earlier proceeding. (Hr. 108). Ultimately, as implied in Judge Hellerstein’s opinion, now is the proper time to review the claim of excessive force.

## II. THE SECRET SERVICE AGENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The Second Circuit has held that to defeat a defense of qualified immunity, a plaintiff must demonstrate that “no reasonable officer would have made the same choice.” Lennon v. Miller, 66 F.3d 416, 426 (2d Cir. 1995). Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” Hunter v. Bryant, 502 U.S. 224, 229 (1991).

However, “when an officer is alleged to have engaged in behavior [that] is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience,” that officer may not benefit from the qualified immunity defense. County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998). In this case, “[t]he obvious cruelty inherent in this practice should have provided [Defendants] with some notice that their alleged conduct” was unconstitutional. Hope, 536 U.S. at 745.

The Government’s actions were so egregious and unwarranted because the Agents shot Carvajal multiple times just seconds after entering the apartment. The Government’s account that

Mr. Carvajal was headed to an open window in the kitchen is no justification for the shooting. Mr. Carvajal would not have posed a threat to the Agents since he was moving away from the shooter. Furthermore, Mr. Carvajal vehemently denies holding any weapon during the raid. Given these key disputes, this case must proceed to trial before a factfinder.

The Government contends that it was reasonable for officers to shoot seconds after invading the home because “they came to the apartment fully aware that Joseph had a lengthy criminal history involving firearms.” *See* Brief for Defendant for Summary Judgement at 20, Carvajal v. Dunleavy, 1:07-cv-00170-PAC (S.D.N.Y. July 6, 2007). It is clear that the officers are trying to escape liability through Plaintiff’s association with his brother. If this line of reasoning were to be accepted, then it would be difficult for any person living with a formerly incarcerated person to seek justice for an unjustified act of excessive force. Lives would be jeopardized through sanctioning a “shoot first” practice whenever a raid involves a person with a history of firearm charges.

The Government also completely mischaracterizes Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001) (granting an officer qualified immunity after incorrectly believing a victim was armed). Police officers in Thompson were responding to a report of shots fired and two suspects fleeing on foot from the scene of an armed robbery. In Thompson, police were responding to an active shooting and Thompson fit the description of the robbery suspect. In this case, Defendants were the first and only ones to use deadly force. The decision to grant qualified immunity is highly fact specific. It was unreasonable in the present case for officers to disregard their training and shoot before identifying the target when they knew that multiple people lived in the home. *See Mullenix v. Luna*, 577 U.S. 7 (2015) (Sotomayor, J., dissenting) (criticizing the police officers who shot at a fleeing car when instructed to “stand by”).

The Government's citation to Tennessee v. Garner is equally off base. 471 U.S. 1 (1985). The Court in Tennessee held that force may be used if "it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 3. However, in the present case, police targeted Mr. Carvajal without assessing whether he posed a threat during flight. Mr. Carvajal was shot only seconds after the Agents barged through the front door. Based on the record, Mr. Carvajal would not have posed a threat to the officers as his back would be facing away from them while trying to discard an "object." Furthermore, it is unlikely that Mr. Carvajal was "escaping," as jumping out of the window would have led to death or bodily harm. It was unreasonable for officers to believe Mr. Carvajal posed a significant threat and the possibility that he would attack the Agents is completely unjustified.

Ultimately, the Government's brief fails to even address the adequacy of Mr. Carvajal's claims of excessive force. It hides behind the doctrine of qualified immunity only to come up short because of how egregious the Agents acted in almost killing Mr. Carvajal.

### III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

On a motion for summary judgment, the moving party bears the burden of establishing that there are no genuine issues of material fact in dispute. See, e.g., Consarc Corp v. Marine Midland Bank, 996 F.2d at 572 (2d Cir. 1993).

Almost every significant fact pertaining to Mr. Carvajal's near death experience is in dispute. Even the fact that Mr. Carvajal held a gun before being shot is in dispute. Mr. Carvajal denies ever possessing a gun during the raid. At this stage in the litigation, the Court must accept Plaintiff's version of the facts as true. See Angelastro v. Prudential-Bache Securities, Inc., 764

F.2d 939, 944 (3d Cir. 1985). Given the genuine dispute over the critical question of whether Mr. Carvajal was armed at the time of the shooting, summary judgment is wholly inappropriate.

Whether Carvajal possessed a gun is not the only issue in dispute. Mr. Carvajal disputes the adequacy of the training that Agents received prior to the raid; he disputes how many times the Agents knocked on the front door; he disputes the announcement of their presence; and he disputes that the recovered gun fell from apartment 6D. Furthermore, the Government and Mr. Carvajal dispute where the shooting occurred. This is significant because Mr. Carvajal could have been deemed a threat if he had been moving towards law enforcement.

This case not only turns on material facts that are in dispute, but the evidence recovered from the crime scene suggests that Mr. Carvajal's account of events is the most accurate.

Mihalek claims that he saw Mr. Carvajal and his brother standing in the hallway outside of the bedroom and then move towards the kitchen. Agent Mihalek claims to have shot Mr. Carvajal as he headed towards the Agents in the kitchen. (Tr. 253). However, based on the layout of the apartment, these facts are heavily disputed. The layout suggests that Mr. Carvajal did not approach the kitchen window to discard an object. This is because Mr. Carvajal would not have been able to enter the kitchen without running into Mihalek. (Tr. 251).

Furthermore, Mr. Carvajal was found on the floor bleeding in a location that does not fit Mihalek's description of events. (Tr. 251). The Agents assert that Mr. Carvajal threw objects out of the kitchen window of 6D. Mr. Carvajal disputes possessing a weapon and discarding that weapon through the kitchen window. The facts verify Mr. Carvajal's version of events. It is unlikely that he would have had the strength to walk seven feet, throw objects out the window, and return to the location where he was found bleeding from gunshot wounds. Agents outside the

apartment building did not see whether the objects fell from apartment 6D or 16D, whose occupants were also part of the money laundering scheme.

Because there are genuine disputes regarding basic facts critical to this case, the Court cannot grant summary judgment to Defendants.

### **CONCLUSION**

For the foregoing reasons, the Court should deny the Government's motion for summary judgment.

Dated: New York, New York  
March 23, 2022

Respectfully submitted,  
Sam Krevlin  
THE LAW OFFICE OF SAM KREVLIN  
40 WASHINGTON SQ  
NEW YORK, NY 10012

**Applicant Details**

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**Applicant Education**

BA/BS From	University of Notre Dame
Date of BA/BS	May 2021
JD/LLB From	New York University School of Law
	<a href="https://www.law.nyu.edu">https://www.law.nyu.edu</a>
Date of JD/LLB	May 30, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Review of Law and Social Change
Moot Court Experience	No

**Bar Admission****Prior Judicial Experience**

Judicial Internships/Externships	No
Post-graduate Judicial Law Clerk	No

## Specialized Work Experience

### Recommenders

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Kaya Lawrence  
67 Herkimer Place, Apt. 5D  
Brooklyn, NY 11216

June 12, 2023

The Honorable Leslie Abrams Gardner  
United States District Court  
Middle District of Georgia  
C.B. King United States Courthouse  
201 West Broad Avenue, 3<sup>rd</sup> Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I am a third-year law student at New York University School of Law, and I am writing to apply for a 2024-2026 term clerkship in your chambers. Born and raised in New Orleans, Louisiana, I am particularly interested in returning home to the South to clerk. As a future Black lawyer, I recognize the importance of cultivating relationships with other lawyers who look like me, and I would value the opportunity to work under your leadership and learn from you.

As a member of a system-impacted family, my upbringing has served as the driving force behind my motivation to help the indigent and has fostered my desire to be an advocate for society's most vulnerable. As a Root-Tilden-Kern Scholar, my legal education has been committed to serving the public interest, and I have been intentional in gaining meaningful experiences that make me confident that I would make a strong addition to your chambers. The breadth of my professional experience reflects a commitment to tackling systemic social justice issues through defense and advocacy as well as honing the necessary skills that will make me an effective advocate and judicial clerk. As a coordinator for the NYU Parole Advocacy Project, I work closely with Appellate Advocates to organize trainings for the student volunteers, and I review and provide feedback on the advocacy letters prepared for the Parole Board's commissioners on behalf of our clients. I also serve as a Teaching Assistant for Lawyering, NYU's legal research and writing program. In this position, I work with first-year law students on their legal research, writing, and advocacy skills, and I provide them with substantive feedback and edits on all of their writing submissions. As the Digital Media Editor for the *Review of Law and Social Change*, I work directly with authors to prepare novel legal scholarship to be published online. As a law intern at the Federal Defenders of New York and as a student advocate in the Criminal Defense and Reentry Clinic, I have become well-versed in client advocacy, legal strategizing, researching nuanced legal issues, and drafting various forms of legal documents. I am currently working with the Federal Defenders of San Diego, and I will be continuing this line of work as a student advocate in the Juvenile Defense Clinic next year. While these experiences will continue to expand my skills in advocating on a client's behalf, I am excited about the prospect of clerking because it will allow me to become a better advocate of the law itself.

My resume, unofficial law transcript, and writing sample are submitted with this letter, along with recommendation letters from Professor Vincent Southerland, Assistant Federal Defender Karume James, and Professor Mindy Nunez-Duffourc. Thank you in advance for your consideration.

Respectfully,

Kaya Lawrence

## KAYA LAWRENCE

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### EDUCATION

#### NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

Candidate for J.D., May 2024

Honors: Root-Tilden-Kern; Lindemann Family Public Service Scholar  
Review of Law and Social Change, Digital Media Editor (2023-2024), Staff Editor (2022-2023)

Activities: Teaching Assistant for Mindy Duffourc, 2022-2023  
Black Allied Law Student Association, Public Interest Chair (2022-2023), Social Committee Chair (2021-2022)  
Ending the Prison Industrial Complex (EPIC), Executive Board  
Parole Advocacy Project, Trainings Coordinator and Parole Advocate  
Law Women, Member  
Women of Color Collective, Member  
Public Interest Law Student Association, Member

#### UNIVERSITY OF NOTRE DAME, South Bend, IN

B.A. in Political Science and Global Affairs, *magna cum laude*, GPA: 3.92, May 2021

Senior Thesis: *Brick by Brick: Pathing the Way to Prison Abolition*

Honors: Posse Foundation Full-Tuition Leadership Scholarship  
Horatio Alger National Scholar  
Gilman International Scholar  
Hagan Scholar  
Pi Sigma Alpha, Gamma Delta Chapter  
Notre Dame Student Leadership Award  
Notre Dame Doan Scholar

Activities: Notre Dame Student Government, Director of Diversity & Inclusion  
Shades of Ebony, President  
Diversity Council, Executive Board  
Class Council, Secretary of Class of 2021  
Notre Dame Student Senate, Senator  
Department of Political Science, Research Apprentice

Study Abroad: John Cabot University, Rome, Italy, Fall, 2019

### EXPERIENCE

#### NYU JUVENILE DEFENSE CLINIC, New York, NY

**Legal Intern and Clinic Student**, September 2023-May 2024

Will work under the supervision of Prof. Randy Hertz and with the Legal Aid Society's Juvenile Rights Practice division in representing children accused of crimes in New York Family Court delinquency proceedings. Will work on all stages of the juvenile/criminal process, including arraignment, investigation, drafting of motions, motions arguments, negotiation, client counseling, suppression hearings, trial, and sentencing.

#### FEDERAL DEFENDERS OF SAN DIEGO, INC., San Diego, CA

**Legal Intern**, June 2023-August 2023

Work with attorneys to assist in preparation for trials including conducting legal research and drafting memoranda. Assist attorneys in other aspects of defending clients against a criminal accusation, including client interviews and visits, investigation, negotiations, discovery, motions practice, and sentencing.

**NYU CRIMINAL DEFENSE AND REENTRY CLINIC, New York, NY**

**Legal Intern and Clinic Student**, September 2022-May 2023

Worked under the supervision of Prof. Vincent Southerland and with attorneys at Brooklyn Defender Services to provide representation to indigent clients and advocated for policies that facilitate the reentry of individuals returning to communities.

Conducted extensive fieldwork including interviewing clients, plea negotiations, investigation, advocacy at arraignments, and litigation.

**NYU PAROLE ADVOCACY PROJECT, New York, NY**

**Trainings Coordinator**, January 2022-May 2023

Worked with Appellate Advocates to organize trainings covering all the fundamentals of the parole process and working with an applicant and coordinated any additional trainings needed throughout the year.

Oversaw and assisted all volunteers with the parole preparation process, including conducting regular legal calls, getting to know who an applicant is, conducting legal visits, preparing parole packets, doing mock interviews, and offering mutual aid and re-entry support.

**FEDERAL DEFENDERS OF NEW YORK, Brooklyn, NY**

**Legal Intern**, June 2022-August 2022

Worked on a trial team to assist in all aspects of litigation, including trial preparation, researching legal questions, discovery review, drafting motions, and participating in court hearings, jury selection, and trial.

Drafted various forms of legal writing for trial, including discovery demand letters, motions *in limine* and replies, jury instructions, proposed *voir dire*, and a motion for lesser included charges.

Assisted the on-duty attorney with arraignments and went on the record to represent the client in removal proceeding.

**SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE, Suffolk County, NY**

**Summer Intern**, Summer 2020

Worked with assistant district attorneys in various bureaus to assist them in the daily work of a prosecutor.

Drafted a proposal on how the office should implement strategies of restorative justice into their work.

Learned how the DA's office prepares witnesses for hearings and trials, picks a jury, constructs opening statements, and performs direct and cross examination.

**JOEL NAFUMA REFUGEE CENTER, Rome, Italy**

**Career Development Intern**, August 2019-December 2019

Prepared refugees and asylum seekers for the workforce by providing resources for them to develop their CVs, prepare for job interviews, talk with industry professionals about finding a job, and know their rights as workers.

**THE FATHER MCKENNA CENTER, INC., Washington, D.C.**

**Service Intern**, Summer 2019

Organized and ran daily Food Pantry program, including organizing food shipments and sorting through available food to present a shopping experience for over 100 low-income residents a week.

Provided assistance with the Day Program and served over 50 men a day experiencing homelessness by organizing and running the clothing drive, serving meals, and checking in the men daily.

**ORLEANS PUBLIC DEFENDERS, New Orleans, LA**

**Intern Investigator**, Summer 2018

Worked with attorneys, staff investigators, and law clerks in all aspects of defense investigation and trial preparation. Completed investigative tasks such as interviewing witnesses, taking statements, writing investigative reports, and performing background checks.

**ADDITIONAL INFORMATION**

LexisNexis Practice Ready Certification. Intermediate Italian. Years of experience working in a daycare and as a nanny and tutor. Southern cooking.

Name: Kaya A Lawrence  
 Print Date: 05/31/2023  
 Student ID: N12778521  
 Institution ID: 002785  
 Page: 1 of 1

**New York University  
 Beginning of School of Law Record**

**Fall 2021**

School of Law				
Juris Doctor				
Major: Law				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei				
Criminal Law		LAW-LW 11147	4.0	B
Instructor: Anna N Roberts				
Torts		LAW-LW 11275	4.0	B
Instructor: Daniel Jacob Hemel				
Procedure		LAW-LW 11650	5.0	B+
Instructor: Troy A McKenzie				
		<u>AHRS</u>	<u>EHRS</u>	
Current		15.5	15.5	
Cumulative		15.5	15.5	

Transitional Justice	LAW-LW 10645	2.0	A
Instructor: Pablo de Greiff			
Criminal Procedure: Post-Conviction Simulation	LAW-LW 10675	4.0	A
Instructor: Randy Hertz			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Mindy Nunez Duffourc			
	<u>AHRS</u>	<u>EHRS</u>	
Current	14.0	14.0	
Cumulative	58.0	58.0	
Staff Editor - Review of Law & Social Change 2022-2023			
<b>End of School of Law Record</b>			

**Spring 2022**

School of Law				
Juris Doctor				
Major: Law				
Constitutional Law		LAW-LW 10598	4.0	B
Instructor: Daryl J Levinson				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei				
Legislation and the Regulatory State		LAW-LW 10925	4.0	B
Instructor: Samuel J Rascoff				
Contracts		LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette				
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR
		<u>AHRS</u>	<u>EHRS</u>	
Current		14.5	14.5	
Cumulative		30.0	30.0	

**Fall 2022**

School of Law				
Juris Doctor				
Major: Law				
Criminal Defense and Reentry Clinic		LAW-LW 10051	3.0	A
Instructor: Vincent Southerland				
Criminal Defense and Reentry Clinic Seminar		LAW-LW 10536	4.0	A
Instructor: Vincent Southerland				
Professional Responsibility and the Regulation of Lawyers		LAW-LW 11479	2.0	A
Instructor: Barbara Gillers				
Evidence		LAW-LW 11607	4.0	B
Instructor: Daniel J Capra				
Teaching Assistant		LAW-LW 11608	1.0	CR
Instructor: Mindy Nunez Duffourc				
		<u>AHRS</u>	<u>EHRS</u>	
Current		14.0	14.0	
Cumulative		44.0	44.0	

**Spring 2023**

School of Law				
Juris Doctor				
Major: Law				
Criminal Defense and Reentry Clinic		LAW-LW 10051	3.0	A
Instructor: Vincent Southerland				
Criminal Defense and Reentry Clinic Seminar		LAW-LW 10536	4.0	A
Instructor: Vincent Southerland				

## TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW JD CLASS OF 2023 AND LATER & LLM STUDENTS

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

### Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

<b>First-Year JD (Mandatory)</b>	<b>All other JD and LLM (Non-Mandatory)</b>
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
<b>Maximum for A tier = 31%</b>	<b>Maximum for A tier = 31%</b>
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
<b>Maximum grades above B = 57%</b>	<b>Maximum grades above B = 57%</b>
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

### Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

#### Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

#### Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

## Federal Defenders OF NEW YORK, INC.

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David E. Patton  
*Executive Director and  
Attorney-in-Chief*

Deirdre D. von Dornum  
*Attorney-in-Charge*

DATE: May 22, 2023

RE: Kaya Lawrence Letter of Recommendation

Your Honor:

This letter of recommendation is prepared in support of Kaya Lawrence's application to serve as a judicial law clerk with your chambers. Kaya was a very talented, motivated, and diligent summer intern who was an asset in our office. The Federal Defenders internship was a 10-week, in-person program where Kaya worked alongside nine other legal interns from law schools across the country.

From early in the program, Kaya stood out with her confidence, seriousness of purpose and was deeply engaged in every facet of our work. Kaya was assigned to a variety of research, writing, and organizational projects, and demonstrated her valuable insight and analytic skills and strong writing. During the internship, Kaya was assigned to support a possession of child pornography trial that involved contact with minors. Kaya, without batting an eye, stepped up to the challenge and was a critical member of the trial team. Kaya assisted several aspects of the trial preparation, including conducting legal research, reviewing discovery and brainstorming defense strategies. Kaya handled several writing projects for the trial, including pretrial motions, discovery demand letters, motions *in limine* and replies, jury instructions, proposed voir dire, and a motion for lesser-included charges. Kaya also had the opportunity to meet directly with the client at the Metropolitan Detention Center in Brooklyn ("MDC"), where the client was detained throughout the pendency of the case and the trial. Kaya was present for every day of the trial and sat at counsel table. The trial was fast-paced and complex, but Kaya kept her composure, remained focused and diligent, and was ready to assist the trial attorneys at every turn. Kaya was an invaluable member of the trial team and was committed to doing her best to support the client and his defense.

Kaya further displayed her advocacy skills when she shadowed an attorney for arraignments. There, she and the supervising attorney were assigned an out-of-district case where Kaya made an appearance on the record to argue for the client's release and to permit him to return to the originating district on his own. In that case, the Court granted the client's release and he was able to return to his home state the same day. Additionally, Kaya had the opportunity to draft a letter to the prosecutor to propose an alternative plea disposition in a sexual assault case. Although the assignment came in the in her final weeks of the internship, Kaya jumped right in. She combed through the facts of the case, conducted extensive research on comparable statutes in several states, and reviewed a detailed report prepared by a psychologist to draft the letter. In the letter, she argued clearly and persuasively that given the client's lack of prior criminal history, willingness to pursue treatment, and comparable cases from the U.S. Attorney's Office, that the client should be afforded

the opportunity to plead to the lesser counts in the indictment. Kaya worked around the clock and finished the letter before the close of the internship. Based on her letter, the government made a plea offer to the requested counts and moved to dismiss the higher counts at sentencing.

Kaya also demonstrated a deep commitment to fighting on behalf of our clients and supporting our work. From the first day of the internship, she asked thoughtful questions, was engaged in every training, and welcomed every assignment with a ready determination. Given the sensitive nature of the trial, I spoke with her at length before and after the trial to assess her state of mind. She was always clear in every check in – she was going to do her best to fight for her client without hesitation and give her best effort, regardless of the charges. I was, and still am, incredibly impressed with her resolute commitment to supporting the most marginalized in our society and she has continued to do so with her 2023 summer internship at the Federal Defenders in San Diego.

Kaya is a strong writer, a great colleague, and dedicated, intelligent, and effective advocate. She had no difficulty grasping complex issues in her assignments, worked very well independently, and completed all of her assignments in a timely manner. She was always open to feedback and sought out the ways to improve her work, which are always great qualities in a law student and young lawyer. She will be an asset to any clerkship because of her drive, energy, and determination. I have no doubt Kaya will be a successful law clerk in your chambers and recommend her without hesitation.

Sincerely,

/s Karume James

Karume James

Assistant Federal Defender

Federal Defenders of New York

(347) 638-3098

karume\_james@fd.org

May 30, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing to express my strong support for Kaya Lawrence's judicial clerkship application. Based on my familiarity with Kaya's work as an incredible teaching assistant (TA) in my year-long Lawyering course (2022-23), I enthusiastically recommend her. On a more personal note, Kaya and I are both from St. Bernard Parish in Southeast Louisiana, and although I did not meet Kaya until working with her at NYU, she embodies the resilience, drive, and character that reflect the best of our working-class hometown.

Kaya's TA application demonstrated remarkable legal research and writing skills for a student completing their first year of law school. Additionally, her Lawyering professor (and my colleague) strongly recommended her to me for the position, praising her work and participation in his class. Indeed, Kaya proved to be an excellent teaching assistant for my Lawyering class this year. The Lawyering Program is a key part of the first-year JD curriculum at NYU. It is a year-long course in which students study the actual practice of law, looking closely at the interactive, fact-sensitive, and interpretive work that is fundamental to excellence in practice. In our Lawyering course, students engage not only in the traditional legal research and writing tasks that most law schools emphasize, but also have an opportunity to work collaboratively and to practice skills typical to most real-world legal practice. Through simulations, discussions, and collaborative critique of their work, students develop skills in the areas of legal writing, client interviewing, counseling, negotiation, mediation, and oral advocacy.

Kaya was one of four TAs that I worked with during this academic year, and she was an indispensable part of the class. As a TA, Kaya attended class, facilitated small group discussions, acted as clients in simulation exercises, and worked closely with a group of 7-10 students – providing them with feedback on their written work. Kaya leveraged both her journal and clinic experiences to provide students with extensive feedback on written work and class simulations. Kaya understood the importance of helping 1Ls develop strong legal research and writing skills. She met with students individually to troubleshoot research and citation issues with them, and answered student questions in class, demonstrating on-call knowledge of the Bluebook that exceeds my own! Additionally, Kaya shared her experiences representing clinic clients in criminal cases, impressing upon students the importance of practical skills, like client counseling, negotiation, and oral argument. She spoke intelligently about substantive law and helped students understand how doctrinal knowledge combines with practical skills and social context in the real world.

Kaya is wildly intelligent, ambitious, and charismatic, but also incredibly genuine and thoughtful. As a result, she was able to easily connect with students, and Kaya took her role as a peer-mentor very seriously. She made it clear from the beginning of the year that students could approach her with questions not only about the course (i.e., research, writing, and Bluebook advice), but about anything law school-related. She developed meaningful relationships with a number of students, helping them navigate law school activities and summer job searches. As a former litigator, who practiced for 12 years prior to joining the legal academy, I am confident that Kaya possesses the personality, knowledge, and skills to be a successful lawyer and valuable member of the bar.

I also connected with Kaya on a more personal level. We both hail from St. Bernard Parish, Louisiana, a place that was absolutely devastated by Hurricane Katrina. Enduring this experience at any age, but especially as a child, demands fortitude. I witnessed my 3 younger siblings experience losing schools, friends, family, their house, and nearly every aspect of "home." Although I didn't know Kaya at the time, I do have a deep sense of what she would have gone through. We have often discussed the ongoing effects of "the storm" on our hometown, including poverty, addiction, mental health issues, and identity struggles. But, we have also discussed with pride – resilience; with reflection – healing and recovery; and with hope – progress, inclusion, and equality.

I am so glad that I had the privilege to work with Kaya this past year, and I know that she would make an invaluable contribution to your chambers as a judicial law clerk. If you have any questions or would like additional information, please do not hesitate to contact me at [mindy.duffourc@nyu.edu](mailto:mindy.duffourc@nyu.edu).

Sincerely,

/s/ Mindy Nunez Duffourc  
Acting Assistant Professor  
New York University School of Law

Mindy Duffourc - [mindy.duffourc@nyu.edu](mailto:mindy.duffourc@nyu.edu) - 212-998-6627



**VINCENT MICHAEL SOUTHERLAND**  
*Assistant Professor of Clinical Law*  
*Co-Faculty Director, Center on Race,*  
*Inequality, and the Law*

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 vincent.southerland@nyu.edu

June 12, 2023

**RE: Kaya Lawrence, NYU Law '24**

Your Honor:

With great enthusiasm, I write in full support of Kaya Lawrence's application to serve as a law clerk in your chambers. Kaya is an outstanding student, who, throughout law school has deployed an exceptional legal acumen in service of her fierce commitment to securing equal justice under law for all. She has done so while building and honing the skills to ensure that she will be a phenomenal lawyer. Kaya's keen intellect, complemented by her rigorous attention to detail, thoughtful nature, collaborative spirit, tremendous work ethic, and unassuming manner leave me with no doubt that she would make an excellent law clerk. I therefore wholeheartedly recommend her to you without reservation.

I am an Assistant Professor of Clinical Law, Director of the Criminal Defense and Reentry Clinic, and Faculty Director of the Center on Race, Inequality, and the Law at New York University School of Law, where I engage in advocacy, public education, and litigation to advance racial justice. I have also served as an Assistant Federal Defender in the Southern District of New York, a Senior Counsel at the NAACP Legal Defense and Educational Fund, Inc., a public defender at The Bronx Defenders, an E. Barrett Prettyman Fellow at Georgetown University Law Center. Upon graduation from law school, I served as a law clerk to the Honorable Judge Theodore A. McKee, former chief judge of the United States Court of Appeals for the Third Circuit, and the Honorable Judge Louis H. Pollak (deceased), of the United States District Court for the Eastern District of Pennsylvania. I count my clerkship experiences among the highlights of my legal career.

Kaya was a student in the Criminal Defense and Reentry Clinic during the 2022-2023 academic year. The clinic is a year-long experience divided between seminar and fieldwork components. The seminar focuses on criminal law, criminal procedure, race and the criminal system, the development of trial and advocacy skills, and advocacy outside the confines of individual cases. It also provides students with an opportunity to work on smaller group projects on a range of

Kaya Lawrence, NYU Law '24

June 12, 2023

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concerns that relate to, and intersect with, the criminal legal system. The fieldwork consists of students working closely with public defenders in local offices throughout the academic year to represent those accused of crimes who cannot afford counsel. I provide supervision in all facets of the students' work in the field and the classroom. Kaya was an absolute standout in all respects.

From the start, Kaya was an active participant in class discussions. It was clear to me that she not only engaged with our readings, which focused on the dynamics of public defense and the criminal system, but came to class prepared to share insights and observations that enriched the classroom dynamic. She was naturally curious about everything, from procedural matters to the substance of criminal defense practice. Her questions pushed us all to think more critically about public defense and the tensions between individual representation and broader systemic change.

Kaya brought the same curiosity, preparation, and intellectual rigor to our advocacy exercises. The year culminated in a mock trial, where some students in our class played the role of a prosecutor. Kaya was one such student. Even as a dedicated defender, she engaged with the role with zeal. In doing so, she demonstrated an ability to see legal issues from a different perspective—that of those who would ordinarily be her opposition—and to do so in a fair and even-handed manner. Her cross examination of a defense expert evinced a mastery of the facts and the law of evidence. And her closing argument, on behalf of the prosecution, was passionate, compelling, and well-reasoned, blending a thoughtful narrative recitation of the facts and the law to make a powerful case in support of a conviction.

As was the case in the classroom, Kaya's fieldwork was superb. She conducted legal research and drafted memoranda, digested discovery materials, assisted with all aspects of trial preparation, and counseled clients. Over the course of the year she produced legal memoranda on complex criminal procedure issues, crafted cross examination questions, and in a homicide case, engaged in the tedious but important work of reviewing and summarizing discovery materials. In that same case, based on her review of the discovery, Kaya conducted research on evidentiary issues relevant to potential pretrial motions. Kaya consistently provided her written product to me for review before submitting it to the lawyers she worked with; rarely, if ever, did I suggest she make any changes to her work product. The lawyers with whom Kaya worked lavished praise on her for her work ethic, intelligence, and excellent research and writing skills. They explained to me that Kaya's combination of maturity, collegiality, and top-notch work made her an invaluable asset throughout the year.

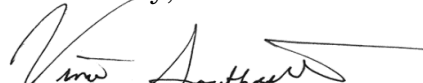
Kaya Lawrence, NYU Law '24  
June 12, 2023  
Page 3

Although I am most familiar with Kaya's work in the classroom and the field, I know that she also served as the Public Interest Chair for NYU Law's Black Allied Law Students Association (BALSA) and was the Training Coordinator for Parole Advocacy. Her BALSA role allowed her to serve as a liaison for BALSA students pursuing public interest opportunities, by coordinating information sessions, disseminating information about jobs, fellowships, scholarships, and conferences. Her Parole Advocacy role required that she developed trainings with a local advocacy organization to detail the parole hearing process for those assisting applicants seeking release on parole. Both roles required significant time and energy, and demanded that Kaya deploy leadership skills and the ability to work independently. That she was successful in these extracurricular capacities is especially impressive given the demands of clinic and other academic commitments.

All of these experiences speak directly to Kaya's superlative qualifications to serve as a law clerk. I know, based on my supervision of her throughout the year, that she is a superb legal researcher and writer. She readily grasps complex concepts, works independently, and is thorough and efficient. She has amply demonstrated her ability to balance a range of diverse and demanding responsibilities, and to do so with a fastidious attention to detail that is required of a law clerk. She is a team player, and possesses collaborative and cooperative spirit. She is a critical thinker with a deep analytical lens, balanced with compassion. She is able to consider varied perspectives, while applying theoretical concepts to real-world problems. In short, I think Kaya would be a tremendous law clerk.

Given all of that, I cannot recommend Kaya highly enough. I stand ready to answer any questions that you might have about Kaya or her application, and can be reached at [vincent.southerland@nyu.edu](mailto:vincent.southerland@nyu.edu) or by phone at 267-608-7300.

Sincerely,



Vincent Southerland

**KAYA LAWRENCE**

570 Nostrand Avenue, Apt. 5D, Brooklyn, NY 11216 | (504) 495-8448 | Kal9359@nyu.edu

**WRITING SAMPLE**

The following writing sample includes excerpts of two arguments I wrote as part of the pretrial motions for the trial I worked on during my summer at the Federal Defenders of New York. The first argument is part of the defendant's motions *in limine*, and the second argument is part of the defendant's response to the government's motions *in limine*. Both arguments excerpted here were ultimately granted by the judge. I obtained permission to use this writing sample from both my supervising attorney and the head attorney for the trial. The defendant's name has been changed and other identifying information removed for confidentiality purposes. Although not originally part of the motions, I have also included a brief summary of the facts section to provide context.

## Federal Defenders OF NEW YORK, INC.

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David Patton  
*Executive Director and  
Attorney-in-Chief*

Deirdre D. von Dornum  
*Attorney-in-Charge*

### STATEMENT OF FACTS

Mr. Smith is charged in an 11-count superseding indictment. Each one concerns accessing, distributing, or attempting to produce child pornography. The government alleges that Mr. Smith attempted to produce child pornography over social media by using misleading accounts and having the minor victims – ages 9 through 13 – create the pornography through live video messaging. Specifically, Counts One and Two of the Superseding Indictment allege that on two separate occasions, Mr. Smith distributed an image or video containing child pornography over the social-media application Instagram in violation of 18 U.S.C. § 2252(a)(2). Count Three alleges that – in violation of 18 U.S.C. § 2252(a)(4)(B) – Mr. Smith used an iPhone to access child pornography with the intent to view it, and this child pornography involved a minor who was prepubescent or younger than 12 years old. Counts Four through Ten charge that Mr. Smith violated 18 U.S.C. § 2251(e) by attempting to employ, use, persuade, induce, entice, and coerce seven minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. Lastly, Count Eleven alleges that Mr. Smith committed the offenses charged in Counts Four through Ten while being required to register as a sex offender in violation of 18 U.S.C. § 2260A.

### ARGUMENT

#### **1. The Court Should Bifurcate Count Eleven From The Other Charges**

Mr. Smith is charged by superseding indictment with distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2); access with intent to view child pornography in violation of

18 U.S.C. § 2252(a)(4)(B); attempted sexual exploitation of children in violation of 18 U.S.C. § 2251(e); and offense by a registered sex offender in violation of 18 U.S.C. § 2260A.

The Court should bifurcate Count Eleven, charging the commission of an offense involving a minor while being a registered sex offender in violation of 18 U.S.C. § 2260A, from the trial on the remaining counts. Bifurcation is the only means of preventing unfair prejudicial spillover resulting from the introduction of evidence that Mr. Smith is a registered sex offender as the jury considers the other counts.

District courts in the Second Circuit enjoy broad discretion in determining whether to bifurcate a trial. Rule 8(a) of the Federal Rules of Criminal Procedure allows the joinder for trial of offenses “based on the same act or transaction.” Fed. R. Crim. P. 8(a). Under Rule 14(a), a defendant may move to bifurcate a trial where joinder of the counts “appears to prejudice a defendant.” Fed. R. Crim. P. 14(a). Such rules “are designed to promote economy and efficiency and to avoid a multiplicity of trials, so long as these objectives can be achieved without substantial prejudice to the right of the defendant to a fair trial.” *United States v. Sterling*, No. 16-cr-488 (LAK), 2017 U.S. Dist. LEXIS 80424, at \*12 (S.D.N.Y. May 24, 2017) (quoting *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993)). Thus, the “determination of risk of prejudice and any remedy that may be necessary” is left to the discretion of the district courts. *Id* at 12.

In *United States v. Jones*, the Second Circuit held that joinder of an ex-felon count with other charges is sufficiently prejudicial to require “either severance, bifurcation, or some other effective ameliorative procedure.” *United States v. Jones*, 16 F.3d 487, 492 (2d Cir. 1994). The court found that a limiting instruction was not sufficient as an “ameliorative procedure” because the jurors would not be able to perform the “mental acrobatics” of following a jury instruction in

which “the judge reminded the jurors repeatedly that Jones was a convicted felon as he simultaneously asked them to put this consideration out of their minds” when deliberating on the other charges. *Id.* at 492-93. Similar to the ex-felon count in *Jones*, the registered sex offender charge in this case is sufficiently prejudicial to necessitate bifurcation since expecting a jury to ignore such a fact “is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities.” *Id.* at 493 (quoting *United States v. Daniels*, 248 U.S. App. D.C. 198, 770 F.2d 1111, 1118 (D.C. Cir. 1985)).

Courts in this Circuit, including in the Eastern District, routinely bifurcate felon-in-possession charges where it would prejudice the jury as to other counts. *See United States v. Lake*, 229 F. Supp. 2d 163, 172 (E.D.N.Y. 2002) (granting a motion to bifurcate a felon-in-possession charge in order to prevent “possible prejudicial spillover” on the other counts); *United States v. Mack*, 2016 WL 1312742 (D. Conn. April 4, 2016); *United States v. Carabello*, 2013 WL 4647787 (D. Vt., Aug 29, 2013); *United States v. Robert Smith*, 15 CR 448 (BMC) (E.D.N.Y.); *United States v. Shameke Walker*, 15 CR 388 (JBW) (E.D.N.Y.).

Following the reasoning of felon-in-possession bifurcation, courts in other districts have also granted bifurcation of § 2260A sex offender registry charges. In *United States v. Never Misses a Shot*, a district court bifurcated the count charging § 2260A violation to avoid unfair prejudice and any possibility that the jury might infer guilt on the other counts because of the defendant’s status as a registered sex offender. *United States v. Never Misses A Shot*, No. 13-30013-RAL, 2013 U.S. Dist. LEXIS 104395, 2013 WL 3872837, at \*2-3 (D.S.D. July 25, 2013). Other courts have employed this bifurcation approach as well. *See United States v. Chatman*, No. 21-CR-295, 2022 U.S. Dist. LEXIS 100770, at \*19-20 (D. Neb. June 6, 2022) (finding “bifurcation within the trial would sufficiently alleviate any prejudice that could arise regarding

Defendant having to register as a sex offender”); *United States v. Bobal*, No. 18-CR-60072-BB-1 (S.D.Fl. 2020) (adopting a two-day, bifurcated trial in which the district court did not inform the jury about the charge under § 2260A until after the jury convicted the defendant of the other charge).

Here too, Mr. Smith seeks bifurcation of Count Eleven, the offense by a registered sex offender charge, from Counts One through Ten. We seek bifurcation on two grounds: (1) that bifurcation will promote the efficient and convenient resolution of this matter and (2) that bifurcation will avoid unfair prejudice to Mr. Smith at trial. Bifurcation will advance the efficient resolution of this case as a whole. Any finding of guilt under 18 U.S.C. § 2260A is derivative of a finding of guilt under Counts Four through Ten—the charges alleging attempted sexual exploitation of children in violation of 18 U.S.C. § 2251(e). In the event the Government secures a conviction on one of Counts Four through Ten, the jury will then be permitted to hear evidence of Mr. Smith’s status as a registered sex offender and render a verdict on Count Eleven.

The unfair prejudice that would flow from the jury learning of Mr. Smith’s status as a registered sex offender would vastly outweigh what little, if any, speculative, probative value such information could have. Fed. R. Evid. 403. Such an unfair prejudicial effect “may be created by the tendency of the evidence to prove some adverse fact not properly in issue or unfairly to excite emotions against the defendant.” *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980); *United States v. Massino*, 546 F.3d 123, 132-33 (2d Cir. 2008). Bifurcation of Count Eleven is an appropriate method to limit prejudice while only seating one jury and preserving the efficiency of the Court.

**2. The Court Should Exclude Irrelevant, Inflammatory, and Extremely Prejudicial Chats Pursuant to Federal Rules of Evidence 401, 403, and 404**

The government’s statement of facts suggests that it intends to introduce at trial certain portions of the social media messages that are not relevant to any of the charges in the superseding indictment. Specifically, the government intends to introduce conversations between Mr. Smith and Jane Doe 3 regarding a kidnapping and rape fantasy. *See* Gov’t Mot. In Lim. At 9 (When Jane Doe 3 responded that they were basically going to kidnap her, the defendant responded, ‘yes, and rape u. We will cover ur mouth with a cloth so u don’t cry and scream.’”). These chats are extremely prejudicial and lacking in any probative value. As such, the Court should preclude any social media conversations that reference violent fantasies, and the government’s trial exhibits depicting these conversations should be redacted accordingly.

The superseding indictment charges Mr. Smith with, among other crimes, attempted sexual exploitation of children in violation of 18 U.S.C. § 2251. But the sexual fantasy chats are not relevant to the government’s proof that Mr. Smith attempted to “persuade, induce, entice [or] coerce a minor” to engage in sexually explicit conduct “for the purpose of producing one or more visual depictions of such content.” 18 U.S.C. § 2251(a). *See* Fed. R. Evid. 401.

When read in their entirety, it is clear that the violent fantasy chats were not intended to and did not motivate any of the charged Jane or John Does to create any pornographic materials. They serve no purpose other than to inflame, disgust, and repulse the jury with the insinuation of deviant sexual fantasies and role play—and to ensure that Mr. Smith is convicted based on those sentiments as opposed to a fair consideration of the evidence supporting the charges. Furthermore, these chats are not necessary to “provide background for the events involved in the case.” *See United States v. Nektalov*, 315 F. Supp. 2d 367, 371 (S.D.N.Y. 2004).

Even if the Court finds these chats sufficiently relevant to the elements of the charged offenses, Your Honor should preclude their introduction because any probative value they have is substantially outweighed by the danger of unfair prejudice and confusion, and of misleading the jurors as to the nature of the charged offenses in this case. *See* Fed. R. Evid. 403; *see also United States v. Gilan*, 967 F.2d 776, 782 (2d Cir. 1992). To show that the evidence in question is more probative than prejudicial, the government “must show that it would not unduly inflame the passion of the jury, confuse the issues before the jury, or inappropriately lead the jury to convict on the basis of conduct not at issue in the trial.” *United States v. Defreitas*, No. 07-CR-543 (DLI), 2010 WL 2292194, at \*3 (E.D.N.Y. June 3, 2010) (quoting *United States v. Quattrone*, 441 F.3d 153, 186 (2d. Cir. 2006) (internal quotation marks omitted)). The government cannot do so in this case. Exposing the jury to these chats creates more than a substantial risk that Mr. Smith would be convicted based on the highly inflammatory fantasies and fetishes that Mr. Smith expressed to the Jane and John Does, as opposed to the conduct that the government has accused Mr. Smith of in the superseding indictment.

While the charged offenses allege serious crimes committed against minors, they do not involve anything close to the heinous, albeit fantastical, behavior suggested by Mr. Smith in the relevant chats. As a result, any probative value they may have is vastly outweighed by the danger of unfair prejudice. *See United States v. Hite*, 916 F. Supp. 2d 110, 120-36 (D.D.C. 2013) (redacting chats “so as to limit the overall volume of evidence and remove the least probative but most prejudicial aspects of the chats.”). These chats must be redacted from the government’s exhibits and not be elicited in testimony at trial to ensure that they do not “lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The Court cannot permit the jury charged with

evaluating Mr. Smith's guilt or innocence to be swayed by these extremely prejudicial conversations and to convict him simply because "a bad person deserves punishment." *Id.* (internal quotation marks and citations omitted). Mr. Smith's right to a fair trial is put in jeopardy if these chats are admitted into evidence.

## Applicant Details

First Name **Elena**  
 Last Name **LeVan**  
 Citizenship Status **U. S. Citizen**  
 Email Address [e.r.levan@wustl.edu](mailto:e.r.levan@wustl.edu)  
 Address

**Address**  
**Street**  
**1020 Union Blvd., Apt. 301**  
**City**  
**St. Louis**  
**State/Territory**  
**Missouri**  
**Zip**  
**63113**

Contact Phone Number **(609) 206-9199**

## Applicant Education

BA/BS From **University of Maryland-College Park**  
 Date of BA/BS **May 2020**  
 JD/LLB From **Washington University School of Law**  
[http://www.nalplawschoolsonline.org/ndlsdir\\_search\\_results.asp?lscd=42604&yr=2014](http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014)  
 Date of JD/LLB **May 13, 2024**  
 Class Rank **20%**  
 Law Review/Journal **Yes**  
 Journal(s) **Washington University Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Wiley Rutledge Moot Court Competition**

## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

### **Specialized Work Experience**

### **Recommenders**

Crain, Marion  
mgcrain@wustl.edu  
314-935-3459

D'Onfro, Danielle  
donfro@wustl.edu

Osgood, Russell  
rosgood@wustl.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Elena Ryann LeVan**

1020 Union Blvd. #301, St. Louis, MO 63113  
e.r.levan@wustl.edu | (609) 206-9199 | she/her

June 12, 2023

The Honorable Leslie J. Abrams Gardner  
U.S. District Court for the Middle District of Georgia  
C.B. King United States Courthouse  
201 W. Broad Avenue, 3rd Floor  
Albany, GA 31701-2566

Dear Judge Abrams Gardner:

I am a rising third-year student at Washington University in St. Louis where I am Senior Executive Editor of the *Washington University Law Review*, winner of the Wiley J. Rutledge Moot Court Best Brief award, and a leader of the Student Bar Association. I write to apply for a clerkship in your chambers starting in the fall of 2024 or any subsequent term. I am particularly interested in clerking in Georgia because I am hoping to move to the South to be near family and to eventually begin my career as a civil rights lawyer.

My strong background in legal research, writing, and editing would make me a valuable asset to your chambers. Working in chambers for the Honorable Audrey G. Fleissig for the Eastern District of Missouri, I researched and drafted judicial orders on a motion for summary judgment and a motion to exclude expert testimony. It was this experience that piqued my interest in clerking for a federal judge and enabled me to earn an A+ in Federal Courts. This spring, I have used the skills and knowledge I gained to support Planned Parenthood Federation of America's national litigation team and help secure healthcare access for folks across the country, focusing on research to develop emerging litigation strategy. My experiences as a copy editor and as Senior Executive Editor, the top technical editing position on the journal, have given me the skills necessary to produce consistently high-quality and detail-oriented work.

Enclosed please find my resume, official law school transcript, and writing samples. A copy of my forthcoming publication is also available upon request. The following individuals are submitting letters of recommendation and welcome inquiries:

Dean Russell Osgood  
Washington University  
rosgood@wustl.edu  
(314) 935-4042

Professor Danielle D'Onfro  
Washington University  
donfro@wustl.edu  
(314) 935-6404

Professor Marion Crain  
Washington University  
mgcrain@wustl.edu  
(314) 935-3459

Please let me know if you are interested in additional information or materials. Thank you for your time and consideration of my application.

Respectfully,

/s/ Elena Ryann LeVan

Elena Ryann LeVan

## Elena Ryann LeVan

1020 Union Blvd. #301, St. Louis, MO 63113  
e.r.levan@wustl.edu | (609) 206-9199 | she/her

### EDUCATION

<b>Washington University School of Law</b>	St. Louis, MO
<i>Juris Doctor Candidate</i>   GPA: 3.77 (Top 20%)	Expected May 2024
<u>Honors:</u>	Scholar in Law Merit-Based Award
	Wiley Rutledge Moot Court Competition, Semifinalist & Best Brief Award
<u>Activities:</u>	<i>Washington University Law Review Vol. 101</i> , Senior Executive Editor
	Student Bar Association, Chair of Mental Health & Wellness
	Sexual Violence Prevention & Advocacy, President & Founder
<u>Clinic:</u>	Immigration Clinic, Student Attorney Spring 2024
<u>Instruction:</u>	Law, Gender & Justice, Instructor Fall 2023
<u>Publication:</u>	<i>Fruit of the Poisonous Tree: Potential Eighth Amendment Protections for Inmates Subject to Sexual Victimization Post-Dobbs</i> (forthcoming WASH. U. L. REV.)
<b>University of Maryland</b>	College Park, MD
<i>Bachelor of Arts in Psychology</i>   GPA: 3.91 (Top 5%)	May 2020
<u>Honors:</u>	Omicron Delta Kappa National Leadership Honor Society
	Fulbright Award Semi-Finalist
<u>Activities:</u>	Dean's Student Advisory Council, Chair of Academic Affairs
	Student Government Association, Director of Sexual Misconduct Prevention

### EXPERIENCE

<b>Barnard Iglitzin &amp; Lavitt LLP</b> , Seattle, WA	Aug. — Nov. 2024
<i>Intern.</i> (Upcoming)	
<b>National Women's Law Center</b> , Washington, D.C.	June — Aug. 2023
<i>Reproductive Rights &amp; Health Intern.</i>	
<b>Planned Parenthood Federation of America</b> , New York, NY	Jan. — Apr. 2023
<i>Litigation Extern.</i> Drafted memoranda on matters of state constitutional claims, contraceptive access under Title X, and impact of proposed legislation, among others. Conducted legal research to contribute to court filings and to advise affiliate health centers on compliance matters.	
<b>U.S. District Court for the Eastern District of Missouri</b> , St. Louis, MO	Sept. — Dec. 2022
<i>Judicial Extern, Honorable Audrey G. Fleissig.</i> Drafted judicial orders, provided Bluebook edits, performed cite checks. Observed court proceedings.	
<b>Equal Employment Opportunity Commission</b> , Washington, D.C.	May — July 2022
<i>Enforcement Extern.</i> Processed intake and drafted charges of discrimination based on federal anti-discrimination law. Drafted and reviewed information requests to issue recommendations on Agency findings. Drafted conciliation agreement in multi-party sexual harassment case.	
<b>Student Legal Aid Office</b> , College Park, MD	Aug. — Dec. 2018
<i>Legal Intern.</i> Conducted client intake and presented cases to attorney. Maintained client records.	

### ADDITIONAL WORK & VOLUNTEER WORK & INTERESTS

Additional Work Experience: 1L Skills Course Instructor; Project 440 (Development Coordinator)  
*The Diamondback* (Copy Editor); Communications Assistant (University of Maryland)  
Current Volunteer Work: YWCA Sexual Assault Response Team; Culture of Respect Leadership Team  
Interests: cycling, reading fiction, good coffee, Philadelphia sports, and my two cats



# Washington University in St. Louis

Office of the University Registrar

Page 1 of 2

Record Of: **LeVan, Elena Ryann**

Current Programs Of Study:

Student ID Number: 502959

JURIS DOCTOR

Date Of Birth: 12/29/1998

CERTIFICATE IN PUBLIC INTEREST LAW

Transcript Issued 06/02/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

## Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (SHIELDS)	LAW	W74 500K	2.0	A
PROPERTY (D'ONFRO)	LAW	W74 507X	4.0	A
TORTS (NORWOOD)	LAW	W74 515F	4.0	A-
CONSTITUTIONAL LAW I (OSGOOD)	LAW	W74 520C	4.0	A-

Enrolled Units 14.0

Semester GPA 3.75

Cumulative Units 14.0

Cumulative GPA 3.75

## Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	P
LEGAL PRACTICE II: ADVOCACY (SHIELDS)	LAW	W74 500L	2.0	A-
CONTRACTS (SHILL)	LAW	W74 501K	4.0	A-
CRIMINAL LAW (KAUFMAN)	LAW	W74 502V	4.0	A
NEGOTIATION (HOLLANDER-BLUMOFF)	LAW	W74 503C	1.0	CR
CIVIL PROCEDURE (LEVIN)	LAW	W74 506	4.0	A-

Enrolled Units 16.0

Semester GPA 3.72

Cumulative Units 30.0

Cumulative GPA 3.73

## Fall Semester 2022

THE POLITICS OF REPRODUCTION	INTER D	I50 510	1.5	AUD
ADVANCED NEGOTIATION THEORY AND PRACTICE (HOLLANDER-BLUMOFF)	LAW	W74 578E	2.0	A-
EMPLOYMENT LAW (CRAIN)	LAW	W74 613C	3.0	A
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	A+
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
MOOT COURT (WILEY RUTLEDGE MOOT COURT COMPETITION)	LAW	W75 604S	1.0	CR
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 15.5

Semester GPA 3.89

Cumulative Units 44.0

Cumulative GPA 3.77

## Spring Semester 2023

LABOR LAW (CRAIN)	LAW	W74 557D	3.0	A
SEMESTER IN PRACTICE EXTERNSHIP	LAW	W74 668K	8.0	CR
REGULATING SEX: HISTORICAL AND CULTURAL ENCOUNTERS (APPLETON)	LAW	W74 784	2.0	A
SPECIAL TOPICS IN REPRODUCTIVE JUSTICE: THE ABORTION RIGHT	LAW	W74 816A	1.0	A
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 15.0

Semester GPA 3.79

Cumulative Units 59.0

Cumulative GPA 3.77

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis  
SCHOOL OF LAW

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February 9, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

RE: Recommendation for Elena LeVan

Dear Judge Gardner:

I am writing to recommend my student, Elena LeVan, for a clerkship in your chambers. I have had the pleasure of working with Elena both as a student and as a committee member on a search committee. In both capacities she has consistently been clever, detail-oriented, and mature. I believe she will make an excellent clerk.

I first met Elena when he was a student in my 1L Property class. There, in lieu of a midterm, I have students write a research memorandum that requires them to slog through various public land records systems to complete a problem set. Unlike Westlaw and Lexis, these records are not user-friendly. Elena persevered, marshalling facts from different primary sources to write a precise and well-organized memorandum. Based on this assignment, I believe that she is well equipped to handle cases with messy records and those to which there are no easy answers. In class and in office hours, Elena demonstrated a real interest in the law. On her exam, I was particularly impressed with how she nimbly assembled equitable remedies to formulate a practical solution to a multiparty problem.

In August 2022, Elena joined the committee searching for the new director of WashU's law library. Her role was to both participate in the interview process along with the other committee members and to advocate for students' concerns as the law school rethought the job description. She was unafraid of hard conversations and able to defend her positions nimbly but respectfully even when getting pushback from faculty. This was a confidential search and she handled that with diligence and care. I would welcome the opportunity to work with her again.

Finally, Elena is a delightful student. She is emotionally mature, organized, and interesting to talk with. I am confident that she is going to be an excellent attorney.

Please do not hesitate to be in touch if you have any questions.

Best,

/s/

Danielle D'Onfro  
*Associate Professor of Law*

Washington University School of Law  
One Brookings Drive, MSC 1120-250-258  
St. Louis, MO 63130  
(314) 935-6420

Marion Crain - mgcrain@wustl.edu - 314-935-3459

Washington University in St. Louis  
SCHOOL OF LAW

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February 9, 2023

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

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Please do not hesitate to be in touch if you have any questions.

Best,

/s/

Danielle D'Onfro  
*Associate Professor of Law*

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SCHOOL OF LAW

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November 21, 2022

The Honorable Leslie Gardner  
C.B. King United States Courthouse  
201 West Broad Avenue, 3Rd Floor  
Albany, GA 31701-2566

RE: Recommendation for Elena LeVan

Dear Judge Gardner:

It is my pleasure to recommend Elena LeVan to you for a clerkship in your chambers. Elena is in her second year here at Washington University School of Law where I am the Dean and a Professor of Law. Before coming to Washington University, I was the President of Grinnell College (1998-2010) and, before that, the Dean (1988-1998) and a faculty member (1980-1998) at Cornell Law School in Ithaca, New York.

I first got to know Elena in the fall of 2021 when I had her as a student in our basic Constitutional Law course (structure and functions). Elena was a capable contributor to class discussions. She wrote an excellent mid-semester paper on Title IX. Her final exam was definitely of high quality, well-written and intelligent. She received a final grade of A- in the course. After the end of the first semester, I appointed her to serve as the sole student on a search committee for the director of the Law Library. The other members told me she was terrific.

Elena would interact well with others in chambers; she is friendly and diligent. She listens well and is a good researcher. I would be happy to talk with you or anyone in your chambers about Elena and her interest in being a clerk (Cell #: 641-821-3712).

Best,

/s/

Russell K. Osgood  
*Dean*  
*Professor of Law*

Washington University School of Law  
One Brookings Drive, MSC 1120-250-258  
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Russell Osgood - rosgood@wustl.edu

**Elena Ryann LeVan**

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**Writing Sample**

*The following writing sample is an excerpt of my brief which won the “Golden Quill Award” for Best Brief in the 2023 Wiley J. Rutledge Moot Court Competition. This is the half of the argument section for which I was responsible and it is original work in its original form. The full brief is available upon request.*

*Factual Background: The competition prompt involved a football coach at a public high school who kneeled and recited the Lord’s Prayer in the locker room in front of players before every football game (a factual variation on Kennedy v. Bremerton School District, 597 U.S. \_\_\_\_ (2022)). Plaintiff Maureen Moxon brought action on behalf of her minor son, K.M., who was a football player. K.M. kneeled, but did not recite the prayer, when it was said before the first two football games. He asked the coach to stop leading the prayers, but he did not do so. After the first two games, K.M. stopped kneeling. K.M.’s coach told him it would be “better for team unity” if he participated. His teammates asked him why he was not kneeling and asked if he was a “heathen.” The district court found that Moxon had standing to sue and that the school district violated the Establishment Clause; the circuit court reversed, finding that Moxon did have standing, but that the District did not violate the Establishment Clause.*

*This brief addresses the first question certified on petition for writ of certiorari: whether the parent of a student who refuses to participate in a prayer led by an on-duty public school employee has standing, as next friend of her child, to assert a violation of the Establishment Clause.*

*Additional writing samples are available upon request.*

## ARGUMENT

### I. MOXON HAS STANDING TO ASSERT AN ESTABLISHMENT CLAUSE VIOLATION AS NEXT FRIEND TO HER INJURED CHILD

Article III of the U.S. Constitution extends the jurisdiction of federal courts to cases or controversies. U.S. Const. art. III § 2. Accordingly, when presented with a dispute, courts examine whether the party seeking relief “alleged such a personal stake in the outcome of the controversy as to assure the case presents concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). Federal courts must be sufficiently limited to preserve a government system of checks and balances. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

In order to satisfy the Article III case or controversy requirement, plaintiffs must show that they have standing to bring their claim. *Id.* at 561. Plaintiffs can establish standing by showing that they: “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).<sup>1</sup>

K.M. has (1) suffered and continues to suffer multiple injuries in fact that are (2) traceable to Kilmer’s coerced pregame prayers and the West Cannon Unified School District’s (“District”’s) enablement of such prayers which (3) can be redressed by the requested injunction.

---

<sup>1</sup> There may be non-Article III prudential considerations that overlap with the three elements of standing described and met here. But, “[a] federal court’s ‘obligation to hear and decide cases’ within its jurisdiction ‘is virtually unflagging.’” *Lexmark Intern, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)) (cleaned up). Because of this unflagging obligation, “[t]he prudential-standing addendum to the Article III standing inquiry has fallen into disfavor in recent years.” *United States v. JPMorgan Bank Acct. No. 8125*, 835 F.3d 1159, 1167 (9th Cir. 2016).

Further, Moxon has “next friend” standing sufficient to request such relief from this court. All three elements of standing are met.

**A. K.M Suffered an Injury in Fact as a Result of Kilmer's Induced Pregame Prayers**

The first element of standing, the injury in fact requirement, ensures that judicial review is limited to cases involving the rights of individuals, *Marbury v. Madison*, 5 U.S. 137, 170 (1803), whose “personal stake in the outcome” assures that the presentation of issues is “concrete[ly] adverse[.]” for judicial resolution. *Baker*, 369 U.S. at 204. This concrete adversity assures a sharp presentation of the issue and zealous advocacy on both sides that allows the issue to be fully heard and litigated. *Id.* The injury in fact requirement can be broken down into two parts. The plaintiff must show that they suffered “an invasion of a legally protected interest that is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

A concrete and particularized injury is one that personally and individually affects a plaintiff (particularized) and that “actually exist[s]”—it is “real,” not “abstract” (concrete). *Spokeo, Inc.*, 578 U.S. at 339-40. Importantly, the injury does not need to be tangible and may arise out of purely noneconomic injuries. *Id.* at 340; *Ass’n of Data Process. Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970). In fact, this Court has recognized “in many of [its] previous cases” that intangible injuries are concrete injuries. *Spokeo, Inc.*, 578 U.S. at 340 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)). Beyond previously sustained injuries, risk of harm itself can satisfy the concreteness requirement. *Id.* at 341.

According to the Supreme Court, the case-or-controversy requirement that motivates standing doctrine is “grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit . . . .” *Id.* at 340-41. There are few rights considered as fundamental and traditionally worthy of protection as those promulgated in the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 425-30 (1962) (detailing the historical importance of the Establishment Clause from the time early colonists left England to the Founders’ unwillingness to let “their privilege of praying whenever they pleased be influenced by the ballot box”).

This Court said as much in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), where suit was brought in two companion cases by school children and their parents against districts that required school prayer at the beginning of the school day. Though there was disagreement in the lower courts about whether school prayer infringed on the plaintiff students’ constitutional rights, the Court found that these plaintiffs had standing under the Establishment Clause, stating in a footnote:

It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. The parties here are school children and their parents, who are *directly affected* by the laws and practices against which their complaints are directed. *These interests surely suffice* to give the parties standing to complain.

*Id.* at 224 n.9 (emphasis added) (citations omitted).

The second component of an injury in fact, that the injury be “actual or imminent” is met where the plaintiff “has sustained or is immediately in danger of sustaining” a real and immediate direct injury. *City of L.A. v. Lyons*, 461 U.S. 95, 101-02 (1983). Cases that fail the standing requirements on this element generally are those in which it is uncertain whether the

conduct will occur or whether it will occur again. *See, e.g., id.; United Pub. Workers of Am. (C.I.O) v. Mitchell*, 330 U.S. 75 (1947); *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”).

Here, there is no question of whether the conduct has occurred, nor whether the conduct will happen again. Coach Kilmer has continued to lead these pregame prayers and has, in fact, announced his intent to continue this coercive practice. R. at 4. The District has stated explicitly that they do not intend to stop inflicting such injuries. R. at 5. K.M. suffers injury from exposure to coercive, government-sponsored religious speech, from the stigma that is associated with his non-participation—an injury this Court has recognized as one of the most serious an individual can face.

1. K.M Suffers Injury from Kilmer's Unwelcome and Coerced Pregame Prayers. Coach Kilmer has led pregame prayers in the locker room for over two decades in his official capacity as coach during a time when players are expected (if not required) to be present. R. at 1; *cf. Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2407 (2022) (football coach “offere[d] a quiet personal prayer” after games). Kilmer monitors participation in this prayer. Meanwhile, K.M. must be present in the room. He must choose to either participate in the prayer sessions by kneeling and/or reciting the prayer, or, to not participate. Either way, his Coach and his peers have and will continue to notice. R. at 2. “It would be best for team unity if you joined in the prayer.” “Why weren’t you kneeling?” “Are you a heathen?”

K.M.’s participation on the football team comes with it exposure to regular incidents of government-sponsored religious speech. Coach Kilmer’s overall monitoring of participation, and his specific encouragement that K.M. participate only further particularize the injury. The fact

that other players were also injured by these coercive prayers does not lessen K.M.'s injury as both a member of the team subject to the general coercion and an individual who was further subjected to specific coercion. There is nothing hypothetical about the injury. One does not need to conjecture, but to simply peruse the record for a showing that K.M. has personally suffered—and the impact does not end there.

2. K.M Suffers a Stigmatic Injury From Non-Participation in Kilmer's Public Display. A noneconomic stigmatizing injury is “one of the most serious consequences” of government discrimination and can support a plaintiff’s standing if they have been personally affected by that discrimination. *Allen v. Wright*, 468 U.S. 737, 754-55 (1984). Stigmatic injuries are conferred through the “perpetuat[ion] of ‘archaic and stereotypic notions’ or by stigmatiz[ation] of the disfavored group as innately inferior and therefore as less worthy participants in the [] community.” *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

This is precisely the injury that followed from Kilmer’s coerced prayers and the District’s enabling of such prayers in contravention of the Establishment Clause. There is massive stigmatic harm to a minor and high school student present in the room while his peers recite a prayer (at the beckoning invitation of the head coach), particularly when the student’s lack of participation can be easily observed through physical indication. Beyond K.M.’s simple exposure to the prayer, his teammates therefore can, and did, observe his nonparticipation and act upon that information. Coach Kilmer himself used his observation to encourage K.M. to participate—it would be “best” for the team. R. at 2. K.M.’s teammates used their observations to bully K.M. After all, is he a “heathen”? *Id.* These are precisely the archaic stereotypes and stigmatization that stigmatic injuries are meant to encompass. Further, this is precisely the type of injury the

Establishment Clause seeks to avoid. *See Engel* at 425-30. And that harm will not stop absent a remedy.

3. K.M Faces “Certainly Impending” Future Harm and Injury. A “certainly impending” future injury, or “substantial risk” that a harm will occur is, itself, sufficient to convey standing. *Whitmore*, 495 U.S. at 158; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (holding that petitioners had standing to seek relief in part because they intended to continue engaging in substantially similar conduct in the future); *see also Holder v. Human. Law Project*, 561 U.S. 1 (similarly holding that petitioners had standing to seek relief because plaintiffs contended they would engage in the conduct again if found to be permissible). The injury must simply not be “too speculative for Article III purposes” so that the dispute may be sufficiently concrete for judicial resolution. *Lujan*, 504 U.S. at 564 n.2.

“Coach Kilmer has testified that he intends to continue leading his players in prayer before the games . . . and the superintendent of the District has testified that the District does not intend to take any actions to prevent Coach Kilmer from doing so.” R. at 5. K.M.’s risk of harm here is by no means speculative. There is not just a substantial risk that the District will impose future harm, there is a certainty—the District and Kilmer have conceded as much themselves.

The allegation of future harm asserted here is not that K.M. may face setbacks in his valued football career because his nonparticipation in the prayer is bad for “team unity”—though that injury is distinctly possible and perhaps even probable. The allegation of future harm is that K.M. will continue to face the violations of his constitutional rights that the District has said they do not intend to stop anytime soon.

4. K.M. Also Establishes Standing as a Witness to Government-Sponsored Religious Speech. Even if this Court does not recognize the significant injuries K.M. has in fact faced,

K.M.’s general observance of the practice is sufficient even if his harm is somehow not concrete, particularized, and imminent. As noted by the district court in this case, “[s]ome injuries, including those of a constitutional dimension, may be cognizable even if they do not result in some identifiable harm that can be readily measured in damages. So too under the Court’s Establishment Clause jurisprudence.” R. at 5 (citations omitted) (citing *Ass’n of Data Process. Serv. Orgs., Inc.* at 153-54; *Flast*, 392 U.S. at 106). In *Flast*, taxpayers had standing to bring suit against a public school for purchasing religious textbooks under the Establishment Clause because of the “logical nexus” between their status as taxpayers and the Establishment Clause’s purpose of prohibiting government taxing and spending to aid religion. 392 U.S. at 103-04.

Recently, concerns have been raised about this type of supposedly “offended observer” standing, *see Am. Legion v. Am. Humanist Ass’n*, 139 S.Ct. 2067 (2019) (Gorsuch, J., concurring) (citing *Diamond v. Charles*, 476 U.S. 54 (1986)), but that concern overlooks a key concern emphasized by the very case cited to support such conclusions:

[S]tanding [] reflects a due regard for the autonomy of those most likely to be affected by a judicial decision. The exercise of judicial power . . . can so profoundly affect the lives, liberty, and property of those to whom it extends, that the decision to seek review must be placed in the hands of those who have a direct stake in the outcome. It is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.

*Diamond*, 476 U.S. at 62 (1986) (quotations and citations omitted) (cited in *Am. Legion*, 139 S.Ct. at 2098 (Gorsuch, J., concurring)). K.M. is not merely a “concerned bystander.” K.M.’s life continues to be impacted by Kilmer’s coerced pregame prayers, and he cannot participate in his public school’s football team without being subjected to them. K.M. has a direct stake in ensuring no such prayers continue—that much is evident whether standing is found under the traditional standing test or that authorized by *Flast*.

### **B. K.M.'s Injury is Traceable to Kilmer's Pregame Locker Room Prayers**

The second element of standing requires that the injury be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (quoting *Simon*, 426 U.S. at 41-42).

K.M.’s exposure to the unwelcome and coerced pregame prayers are directly traceable to the actions of the District. Kilmer, in his official capacity as coach, “invites” his team of high schoolers to join in public prayer just prior to each football game by kneeling and saying the words of the prayer aloud together with the students. R. at 1-2. In accordance with this Court’s pronouncement in *Monell*, Kilmer’s actions are considered those of the District because they are pursuant to “a [de facto] official policy.” 436 U.S. at 694. The District has a clear and longstanding de facto policy of enabling these prayers, allowing Kilmer to impose this prayer on his young team despite the numerous complaints that have been brought to the District practically since this practice began two decades ago. R. At 5.

Further, the stigma K.M. was subject to because of his nonparticipation directly cited K.M.’s nonparticipation. The classmate’s taunts were not unrelated. Rather, K.M. was told that it would be “better for team unity” if he participated, asked if he was “heathen.” These comments and questions are traceable to the District, through their agent, leading these prayers in violation of the Establishment Clause. R. at 5. Finally, and similarly, the District stated explicitly that it will not take any action to prevent Coach Kilmer from imposing future harm, necessitating injunctive relief from this Court. R. at 5.

### **C. K.M.'s Injury is Redressable by This Court Through the Requested Injunction**

The third and final element of standing is this Court’s ability to redress K.M.’s injury. *See Lujan*, 504 U.S. at 561. This requirement is met where a plaintiff’s injury is “likely to be

redressed by a favorable decision.” *Simon*, 426 U.S. at 38. K.M. has been, and without remedy will continue to be, subject to Kilmer and the District’s violations of the Establishment Clause.

When K.M. was subjected to the pregame prayers, he courageously approached Coach Kilmer and told him that he was uncomfortable with the practice and asked that Kilmer not lead these coercive pregame prayers. R. at 2. Kilmer refused. *Id.* K.M. pushed on. He contacted the principal and the District to ask that they take action and prevent Kilmer from continuing to violate his rights under the Establishment Clause. *Id.* The District refused.

Nothing has changed. The District has made it clear that, absent an injunction, K.M. will continue to be subjected to further religious displays and associated injuries. Far from the “conjectural” threatened injury faced by some, *Lujan*, 504 U.S. at 560, the District unabashedly admits that they plan to continue their constitutional violations absent intervention from this Court. R. at 5. And there is no reason to doubt that assertion. Over the past twenty years, Kilmer has made it a regular habit to violate the Establishment Clause as an agent of the District, and the District has enabled him to do so. The District has enabled him to do so over the objections of numerous students who have submitted complaints about the practice over the past two decades—complaints that arose within just a year after the coercive pregame prayers began. R. at 1, 5.

An injunction would force the District’s hand. It would legally obligate the District to ensure the District and Kilmer respect the Establishment Clause. This would put an end to the induced pregame prayers. Without the induced pregame prayers, K.M. would not face stigmatic injury for his nonparticipation, and it would eliminate the risk of future harm.

**D. Maureen Moxon Has Standing as Next Friend to Vindicate Her Child's Right to Freedom from Such Imposed Prayers Under the Establishment Clause**

Minors can assert violations of their constitutional rights with the assistance of a representative, Fed. R. Civ. P. 12(c), often a guardian, who will pursue the case on their behalf. *See Whitmore*, 495 U.S. at 163. An individual establishes status as a “next friend” by demonstrating that (1) the real party in interest “cannot appear on his own behalf to prosecute the action” and (2) that the “next friend” is “truly dedicated to the best interests of the person on whose behalf [s]he seeks to litigate.” *Id.* The “next friend” should have “some significant relationship with the real party in interest.” *Id.* at 163-64.

The District does not dispute that Moxon, who has sole custody over K.M., has standing to bring this claim for K.M.’s injury. R. at 5. Because K.M. is a minor and cannot appear himself to vindicate his rights under the Establishment Clause, his full custodial parent Maureen Moxon serves as his “next friend.” There is nothing in the record to suggest that Moxon is not “truly dedicated” to her son’s interest. Rather, Moxon supported K.M. in bringing the violation of her son’s constitutional rights to the attention of the District, and now supports K.M. as his “next friend” to respectfully request this Court enjoin the District from any further violations.

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**Writing Sample**

*The following writing sample is a proposed order drafted during my fall 2022 judicial externship with the Honorable Audrey G. Fleissig for the Eastern District of Missouri. This document is in its original form with no edits from the judge, clerks, or any other party. It is shared with the permission of Judge Fleissig's chambers. The sample is original work, except for the first section (four paragraphs) under the heading "Discussion" which is an edited, adapted version of language taken from the judge's prior orders.*

*Additional writing samples are available upon request.*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

NAME and	)	
NAME,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 0:00-cv-00000-AAA
	)	
NAME, et al.,	)	
	)	
	)	
Defendants.	)	

**PROPOSED MEMORANDUM AND ORDER**

Plaintiffs filed this suit under 42 U.S.C. § 1983 alleging that during peaceful protest activity following the September 15, 2017 verdict in *State of Missouri v. Stockley*,<sup>1</sup> they were unlawfully “kettled,”<sup>2</sup> pepper sprayed, assaulted, and arrested. This is one of several cases arising out of St. Louis Metropolitan Police Department (“SLMPD”) officers’ conduct during the *Stockley* protests. The Court granted in part a motion for summary judgment filed by all of the Defendants except the City. ECF No. 141. Plaintiffs’ claims now include: unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments (Count 1); violations of free speech, press, association, and assembly under the First and Fourteenth Amendments (Count 2); failure to train, discipline, and supervise, and a custom of unconstitutional seizures and using excessive force (Count 4); assault (Count 5); false arrest (Count 6); intentional and negligent

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<sup>1</sup> In *Stockley*, the Circuit Court of the City of St. Louis acquitted police officer Jason Stockley of charges arising from the death of Anthony Lamar Smith. *State v. Stockley*, No. 16220CR02213-01 (Mo. 22nd Jud. Cir. Sep. 15, 2017).

<sup>2</sup> According to the complaint, “kettling” is a law enforcement tactic by which officers encircle a group of protesters without providing a means of egress.

infliction of emotional distress (Counts 9 and 10); excessive force, excluding the alleged kettling and application of zip ties too tightly (Count 12); failure to intervene in the use of excessive force (Count 13); and battery (Count 14).

Defendants seek to present expert opinion testimony regarding nationally recognized standards for policing procedures and whether Defendants here complied with those standards as they relate to Plaintiffs' claims. Plaintiffs have moved to exclude from evidence at trial the opinions, testimony, and reports of Defendants' expert. ECF No. 169. For the reasons set forth below, the motion will be granted in part and denied in part.

### **BACKGROUND**

The City has retained Evan Donnelly, a police practices consultant with a focus on law enforcement operations, as an expert to opine on the "legal and general industry standards for policing procedures." ECF No. 170 at 8. Donnelly is an attorney and Reserve Officer with the Southington, Connecticut Police Department; he has decades of experience providing legal advice, defense, education, and trainings to law enforcement agencies across the country.

In order to arrive at his opinions, Donnelly reviewed the complaint filed in this case and those filed in the several other cases arising out of SLMPD officers' conduct during the *Stockley* protests, video and audio footage from the protest, deposition transcripts, incident reports, training documents, and the City's Civil Disobedience Response Operations Plan, among several additional documents. See ECF No. 170-1 at 3-5. Donnelly compiled a timeline of events and bibliography, and ultimately opined that the City complied with industry standards, SLMPD standards, and the standards set out in the Templeton Agreement in the City's issuance of dispersal warnings, "encirclement" tactics, mass arrest, and use of force.

### **ARGUMENTS OF THE PARTIES**

Plaintiffs argue that Donnelly is unqualified to render his opinions because he has no specialized knowledge of, or experience with, “kettling,” the particular crowd control method used by officers in this case, nor has he ever personally used chemical munitions. Plaintiffs further assert that Donnelly is unqualified because his research, training, and legal representation has all been on behalf of police departments; such a history, Plaintiffs argue, in conjunction with Donnelly’s use of the word “we” throughout his deposition, indicates that Donnelly is testifying as a “colleague-in-arms” rather than an expert. ECF No. 170 at 3. Finally, Plaintiffs argue that Donnelly’s experience as an attorney and “police advocate” would “dispose[] him to offering legal opinions . . . that would be particularly misleading to the jury.” *Id.* at 6-7.

Second, Plaintiffs argue that Donnelly would confuse the jury with misstatements of law and fact based on his allegedly inaccurate conclusions about the facts as they occurred and the appropriateness of the police conduct. Relatedly, Plaintiffs assert that Donnelly’s testimony is not based on sufficient facts and data, citing several times during Donnelly’s deposition that he did not know the answer to a question or did not take a particular fact into consideration in the course of his analysis. Finally, Plaintiffs argue that Donnelly’s methodology is unreliable because his conclusions rely on preconceived assumptions that do not satisfy the reliability requirement.

### **DISCUSSION**

The admission of expert testimony in federal court is governed by Federal Rule of Evidence 702. *Wagner v. Hesston Corp.*, 450 F.3d 756, 758 (8th Cir. 2006). Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. This version of the rule was enacted in response to *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993), which charged trial judges with a “gatekeeping” role to exclude unhelpful and unreliable expert testimony.

Factors relevant to the reliability determination include: “(1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) whether the theory or technique is generally accepted in the scientific community.” *Russell v. Whirlpool Corp.*, 702 F.3d 450, 456 (8th Cir. 2012) (citations omitted). Additional factors include “whether the expertise was developed for litigation or naturally flowed from the expert’s research; whether the proposed expert ruled out alternative explanations; and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case.” *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

“[T]he *Daubert* reliability factors should only be relied upon to the extent that they are relevant and the district court must customize its inquiry to fit the facts of each particular case.” *Shuck v. CNH Am., LLC*, 498 F.3d 868, 874 (8th Cir 2007); *see also Unrein v. Timesavers, Inc.*, 394 F.3d 1008, 1011 (8th Cir. 2005) (stating that the “evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject *Daubert* factors as the particular case demands”). There is no single requirement for admissibility so long as the proffer indicates that the expert evidence is reliable and relevant. *Unrein*, 394 F.3d at 1011. The question is whether the expert’s opinion is sufficiently grounded to be helpful to the jury. *Id.* at 1012.

Although the proponent of the expert testimony must prove its admissibility by a preponderance of the evidence, *Daubert*, 509 U.S. at 592, Rule 702, “is one of admissibility rather than exclusion.” *Shuck*, 498 F.3d at 874. “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Olson v. Ford Motor Co.*, 481 F.3d 619, 626 (8th Cir. 2007). Proposed expert testimony “must be supported by appropriate validation – i.e., good grounds, based on what is known”; expert “knowledge connotes more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590, 599 (citation omitted). But, any “doubts regarding whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.” *Clark v. Heidrick*, 150 F.3d 912, 915 (8th Cir. 1998).

The Court finds that Donnelly’s history of working with, and testifying on behalf of, police organizations does not disqualify him as a witness. However, Donnelly may not usurp the role of the Court by testifying as to legal or constitutional standards, nor may he usurp the role of the jury by endorsing Defendants’ version of events as true. His testimony will be limited to fact-based context on industry standards and practices that will assist the jury in contextualizing Defendants’ actions.

#### Characterizations of Police Conduct

Plaintiffs argue that Donnelly is unqualified to testify as an expert in this case because of his “one-sided” experience working with law enforcement agencies. Such credibility concerns may be addressed on cross-examination but do not, themselves, warrant exclusion of Donnelly’s opinions. Further, Donnelly’s knowledge, experience, and training are sufficient to testify as to the specific tactics involved in this case. Donnelly has an extensive background as a law enforcement officer, has advised law enforcement agencies, and has trained law enforcement

agencies and officers for several decades. Rule 702 does not require Donnelly be an expert in the particular tactics used here; it simply requires that his background is sufficient to assist the jury's understanding. *See Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006) ("Gaps in an expert witness's qualifications or knowledge generally go to the weight of the witness's testimony, not its admissibility.") (citation omitted). Donnelly's background is sufficient to assist a jury here.

However, Plaintiffs also worry that Donnelly's background as a lawyer "disposes him to offering legal opinions . . . that would be particularly misleading to jurors." ECF No. 170 at 7. They argue that statements of law and opinions on reasonableness of police behavior would confuse the jury. The Court agrees. Already, Donnelly's report and deposition offer an array of opinions that constitute legal conclusions on the ultimate issues in this case. It is true that opinion testimony is not inadmissible "just because it embraces the ultimate issue" to be decided by the jury, F. R. Evid. 704(a), but "[i]t is well settled that an expert may not offer legal conclusions about a case." *In re Acceptance Ins. Cos. Sec. Litig.*, 423 F.3d 899, 905 (8th Cir. 2005).

In cases involving police conduct in particular, "the Eighth Circuit is clear that experts may not testify to legal conclusions like the overall reasonableness of police behavior." *McDowell v. Blankenship*, No. 4:08-CV-602, 2012 WL 13054254, at \*5 (E.D. Mo. Aug. 17, 2012) (citing *Schmidt v. City of Bella Villa*, 557 F.3d 564, 570 (8th Cir. 2009) (determining that the reasonableness of police procedures is a question of law); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (determining that questions of probable cause and qualified immunity are questions of law)); *see also Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993) (*per curiam*) (determining that the ultimate conclusion about the existence of probable cause is a

question of law); *Scherrer v. Bella Villa*, No. 4:07-CV-306, 2009 WL 690186, at \*4 (E.D. Mo. Mar. 10, 2009) (determining that overall reasonableness of police procedures is a question of law); *Zorich v. St. Louis Cnty.*, No. 4:17-CV-1522, 2018 WL 3995689 (E.D. Mo. Aug. 21, 2018) (determining that reasonableness of police procedures under the “totality of circumstances” test in light of Fourth Amendment standards is a question of law). Such determinations are questions of law and improper subjects for expert testimony. It is the province of the court to direct the jury on such issues. *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003).

Donnelly’s report offers opinions throughout that constitute impermissible legal conclusions regarding the reasonableness of police conduct. For example, Donnelly opines that “the mass arrest . . . was reasonable and consistent with SLMPD policy and procedure, as well as law enforcement industry training and standards” and that “[o]nce the crowd failed to comply, mass arrests were both prudent and reasonable.” ECF No. 170-1 at 25. These opinions are rooted in Donnelly’s descriptions of general industry standards and practice, but the descriptions are improper to the extent that they conflate general industry practices with the legal and constitutional standards. According to Donnelly, the standards he applies are designed to “encourage and assist law enforcement agencies [in] deliver[ing] law enforcement services to communities that are . . . constitutionally and legally sound” and that “ensure that police conduct remains within acceptable legal and constitutional bounds.” *Id.* at 7. With such characterizations, Donnelly implies that compliance with such practices establishes that Defendants did not violate Plaintiffs’ constitutional rights.

The Court is mindful that there may be some instances in which general industry practices incorporate legal and constitutional principles. “However, an expert cannot testify that